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In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-649

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, AND JOHN WEIS,

APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDELL, AND WILLIAM M. YATES,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

Appellants, the City of Boston, its Mayor, and several of its elected officials, appeal from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on October 4, 1978 (App. B). That judgment enjoined Appellants from expending certain public

funds appropriated by the City Council for the purpose of urging the people to adopt a proposed amendment to the state constitution that would avoid a devastating increase in real estate taxes for Boston's homeowners. The court below held that Mass. Gen. Laws ch. 55 ("Chapter 55"), the statute earlier partially invalidated by this Court in *First National Bank* v. *Bellotti*, 98 S.Ct. 1407 (1978), impliedly prohibits municipal corporations and their elected officials from spending public funds to convey their official views on pending referendum proposals to the voters — even proposals whose adoption or defeat would sharply affect the city's tax base, social structure, and fiscal survival. Finding no evidence that the speech proposed by Appellants would deceive the voters or dominate the debate, the Supreme Judicial Court nevertheless held that the state's flat ban on municipal speech assures that "a dissenting minority of taxpayers is not compelled to finance views with which they disagree," App. A, 20a, and thereby protects rights of dissenters recognized by this Court in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and in *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

Appellants represent a municipality and complain of a state statute as construed by the state's highest court. But it would be a serious mistake to view this case as one about state-municipal relations, for the question is not whether a state may choose to structure its affairs through specialized local subdivisions that are simply not empowered to engage in advocacy. The Supreme Judicial Court held that Boston *is* empowered to do just that. Rather, the question is whether a state may *silence one voice* in the political debate — by allowing municipalities to speak on every subject *except* referendum proposals, and to speak to every listener *except* the state's electorate, while permitting every speaker *except* municipalities to address the people on "decisions that will affect the future

development of their own community." *James* v. *Valtierra*, 402 U.S. 137, 143 (1971).*

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, dated August 23, 1978 (App. A), is reported at 1978 Mass. Adv. Sh. 2297, ____ N.E. 2d ____ (1978).

Jurisdiction.

Appellees brought this action in the Single Justice session of the Supreme Judicial Court seeking, *inter alia*, to enjoin certain expenditures by Appellants of public funds appropriated by the City Council for the purpose of urging the people to adopt a proposed amendment to the state constitution in a referendum to be held on November 7, 1978. After the parties

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* It is immaterial that the Supreme Judicial Court might have followed less treacherous paths to its conclusion. Had it not relied upon the rights of dissenting taxpayers, and had it treated all municipal expenditure on advocacy as simply beyond the City's home rule powers, for example, the Court below *might* have reached the same result in a holding less squarely presenting substantial federal questions. But that Court expressly declined to resolve the matter on this "intra-state" level, App. A, 15a, and it is settled that the mere "possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973). *See California* v. *Byers*, 402 U.S. 424 (1971); *Beecher* v. *Alabama*, 389 U.S. 35, 37 n.3 (1967); *Evans* v. *Newton*, 382 U.S. 296, 302 (1966).

entered into an Agreed Statement of Facts (App. C), the case was reserved and reported by the Single Justice to the Full Court without decision. After argument, the Court issued an Order (App. D) on July 19, 1978, enjoining the expenditures by Appellants of public funds so appropriated for such a purpose, and enjoining Appellants from directing City employees to devote time during their regular working hours to solicit public support for the proposed amendment. On July 28, 1978, Appellants submitted a motion for stay of judgment (App. E) and a motion for rehearing (App. F), both of which motions the Court denied on August 23, 1978 (App. G), when the Court also delivered its opinion. After argument on October 4, 1978, in the Single Justice session, the Court on the same date entered its final judgment. Because this final judgment substantially restated the injunctive order the Court had issued on July 19, 1978, Appellants have not again sought a stay of judgment or a rehearing.

A notice of appeal to this Court was timely filed with the clerk of the Supreme Judicial Court on October 16, 1978 (App. H). This appeal is being docketed within 90 days from the August 23, 1978, denial of stay and rehearing below, and within 90 days from the final judgment entered on October 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Statute Involved.

The text of Chapter 55, the application of which to advocacy by municipal corporations is involved in this case, is set forth in App. I.

Questions Presented.

1. Where the City of Boston has determined that its fiscal and social well-being would be endangered by the defeat of a state-wide referendum proposal, does Chapter 55 violate the First Amendment by forbidding the expenditure of municipal funds to urge the people to adopt the proposal, thereby

> (a) burdening the people's right to hear the views of their elected local officials on pending referendum proposals, and to make informed choices about such proposals;
>
> (b) discriminating among speakers, censoring municipal corporations while private business corporations, political action committees, and other collective entities are free to address voters on referendum issues;
>
> (c) discriminating among audiences, banning municipal advocacy directed to voters while leaving the very same speakers free to express the very same messages to state legislators;
>
> (d) discriminating among messages, allowing municipal advocacy on subjects that are not referendum issues, but censoring municipal speech on referendum proposals,

all with no record or legislative findings that such advocacy threatens any real evil, and in a manner that ill-serves the state interests alleged to justify it?

2. May the state enjoin Appellants' proposed advocacy on the theory that dissenting taxpayers have a First Amendment right to prevent government expression of views with which they disagree?

Statement of the Case.

The City of Boston faces a fiscal and social crisis. It confronts the impending effects of a 1974 decision by the Supreme Judicial Court holding that the state constitution mandates a property tax policy of valuing all real estate at 100 per cent of its fair market value.[1] If this policy takes effect, a $78 million tax burden will shift from owners of industrial and commercial property to homeowners, "practically doubl[ing] the tax burden on many single family homes in the city, increasing the tax on them by over $1,000." App. A, 4a (quoting from App. C, 29a). As a result, large numbers of low and middle income residents may be driven out of the city.

By permitting taxation of residential property at a lower rate than industrial and commercial property, the Classification Amendment on the November 7, 1978, ballot in Massachusetts would mitigate the effects of the Supreme Judicial Court's 1974 decision. Therefore, the Boston City Council on June 7, 1978, appropriated funds "for the purposes of providing educational materials and disseminating information urging the adoption by the people of a proposed amendment to the Massachusetts Constitution relating to the classification of property for purposes of taxation."[2]

On June 23, 1978, eleven Boston taxpayers opposed to the Classification Amendment brought an original proceeding in the Court below to enjoin Appellants from using the funds so

[1] *Town of Sudbury* v. *Commissioner of Corporations & Taxation*, 366 Mass. 558, 321 N.E.2d 641 (1974).

[2] App. A, 2a-3a (quoting from Boston, Mass. Ordinance Authorizing the Expenditure of Funds to Inform the Voters on the Proposed Constitutional Amendment Relating to the Classification of Property for Tax Purposes, § 1 [June 23, 1978]).

appropriated.[3] On July 19, 1978, the Court below held that Chapter 55, the statute previously stricken in part by this Court in *Bellotti*, impliedly forbade municipal spending to urge the people to adopt or reject a referendum proposal.[4] Ac-

[3] Had the Supreme Judicial Court entertained the taxpayer suit but ruled against the taxpayer plaintiffs on the merits, a petition filed by the losing taxpayers in this Court might have been dismissed for want of a justiciable controversy inasmuch as the stake of the taxpayers might not in itself satisfy the requirements of Article III. *Doremus* v. *Board of Education*, 342 U.S. 429 (1952). *But cf. Flast* v. *Cohen*, 392 U.S. 83 (1968) (taxpayer standing consistent with Article III). Having been permanently enjoined by the Supreme Judicial Court, however, Appellants plainly have the requisite stake in the outcome of this case to meet the demands of the case or controversy requirement.

[4] In *Bellotti*, this Court struck down those provisions of Mass. Gen. Laws ch. 55, § 8 ("Section 8"), that prohibited certain corporations from making contributions or expenditures "for the purpose . . . of influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." In the instant case, the Court below of course did not presume to resurrect Section 8 as the basis for its holding that the state had banned municipal advocacy on referendum questions; rather, the Court held that Chapter 55 as a whole "manifest[s] an intention to bar municipalities from engaging in the expenditure of funds to influence election results." App. A, 8a. Of the fact that Chapter 55 does not so much as *refer* to municipal corporations, the Court below had this to say, *id.* at 9a:

> The absence of any reference to municipal corporations is significant, not as an indication that municipal action to influence referendum results was intended to be exempt from regulation, but rather as an indication that the Legislature did not even contemplate such municipal action could occur.

After essaying this unexpected construction of Chapter 55 (a construction suggested by none of the parties below), the Court undertook to explain why Section 22A of Chapter 55, signed by the Governor on July 22, 1978, after the oral argument of this case, did not negate its interpretation of Chapter 55. The new section requires the treasurer of each municipality which has "expended . . . any money . . . in order to influence . . . the vote on any

cordingly, the Court issued an order enjoining "[t]he City of Boston, its agents and employees . . . from expending the funds appropriated by the city council on June 7, 1978 . . .." App. A, 5a n.5.

The relevant facts were not in dispute below. The Court acknowledged that "'while many Boston voters understand the impact of 100% valuation on their taxes, few were acquainted with the Classification Amendment or had any idea of its possible impact in mitigating the effects of 100% valuation.'" App. A, 4a (quoting from App. C, 29a). "There are persons and interests [who] . . . will work to defeat it [and] . . . are raising funds from individuals and corporations for that purpose." *Id.* And no one contested below the validity of Appellants' conclusion that the proposed use of City funds was the only effective means of disseminating their view to the people and countering the views of the amendment's opponents.[5] Despite a vague reference to "the possibility of a babel of municipal huckerstering," *id.* at 18a, the Court below

questions submitted to the voters . . . [to] file reports with the director [of campaign and political finance] setting forth the amount or value of every [such] expenditure . . .." Appellants argued in a petition for rehearing that, although the new section does not itself *authorize* municipal advocacy on referendum questions (so as to obviate the need for city council action conferring such authority in each city), the reporting provision of the new section makes no sense unless the legislature *assumed* that its own prior statutes created no bar to such municipal advocacy pursuant to proper city council ordinance. The Court below dismissed that argument without explanation. *See* App. A, 11a.

Because the Supreme Judicial Court inferred that the legislature by its silence had implicitly banned municipal advocacy on referendum issues, the Court held that the City of Boston's enabling ordinance, *see* n.2 *supra*, was "inconsistent with [a] law enacted by the Legislature under the powers reserved to it by the Home Rule Amendment [Mass. Const. art. 89, § 6]," App. A, 7a, and hence was prohibited by state law. *Id.*

[5] *See* Defendants' Brief in the Supreme Judicial Court at 14: "[T]here is no allegation that the information in question could be effectively communicated without [the City's] program . . .."

acknowledged that there was nothing in the record to "demonstrate that the city will abuse its alleged right of advocacy, such as by issuing deceptive, vindictive, or coercive publications, . . . [or] that the city's publications would be monopolistic, or even domineering, or that they are calculated to perpetuate any official in office." *Id.* at 19a n.18.

Despite these findings and its recognition that Chapter 55 could survive First Amendment challenge only if it served a compelling state interest that no less drastic alternative could adequately protect, *id.* at 17a, the Court below did not make or rely on any factual record, judicial or legislative, in finding such an interest and the absence of such an alternative. Recognizing that the state's interest in electoral fairness was not demonstrably threatened on this record, *id.* at 19a n.18, the Court upheld Chapter 55 as necessary to serve a single interest: to protect the "dissenting minority of taxpayers," *id.* at 20a, from having their *pro rata* shares of the City budget, however minuscule, used to finance the expression of views with which they disagree. But, remarkably, this state interest applies only in the case of municipal speech on referendum questions, for the Court below found no state interest in protecting dissenting taxpayers from City efforts to campaign for legislative action at any time,[6] or to address the people directly on any public issue except when it has become the subject of a referendum question.[7] As the Court concluded: "There are a variety

[6] The Court stated that such municipal lobbying "has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people," App. A, 11a n.11, and said nothing about the interests of taxpayers who might disagree with the position taken by the city's lobbyists before the legislature.

[7] The Court ruled that Chapter 55, "regulating election financing[,] manifest[s] an intention to bar municipalities from engaging in the expenditure of funds to influence election results," App. A, 8a, but discovered no statutory bar to municipalities expending funds on public advocacy outside the electoral context.

of instances in which government funds are used lawfully to express views and conclusions on matters of importance when various taxpayers may disagree with those views and conclusions." *Id.* at 14a-15a.

Moreover, the Court below acknowledged that the state could reasonably achieve its interests by less restrictive means than the flat ban on speech leveled by Chapter 55. The Court noted two such alternatives: imposing a ceiling on expenditures,[8] and establishing a rebate or check-off system.[9] Even though it noted that Massachusetts has often employed expenditure ceilings in legislation regulating municipal spending,[10] the Court gave no explanation for its apparent rejection of this alternative. As for a rebate or check-off system, while recognizing that this Court had mandated use of just such a system in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), the Court below concluded that it would be more efficient to suppress the speech. App. A, 21a n.20.

In sum, then, the Court below held that municipalities in the Commonwealth of Massachusetts are authorized to disseminate information at public expense, and to engage in publicly funded advocacy before the legislature, but are forbidden to direct such advocacy to the voters on a referendum

[8] The Court noted that, in numerous areas, the legislature "has imposed limitations on the expenditure of municipal funds," App. A, 19a n.17, including expenditure "for the purpose of advertising [a municipality's] resources, advantages, and attractions." *Id.* Although the Court did not discuss the role of such ceilings in protecting dissenters as such, it did present such ceilings as a means of assuring "fairness," *id.* at 19a, and it seems evident that the expenditure per dissenting taxpayer could be rendered *de minimis* through such a device.

[9] By analogy to the union cases, the Court opined that a proper remedy here "is that any dissenting taxpayer should not be obliged to pay that portion of his local real estate taxes attributable to the city's political activities on the referendum proposal." App. A, 21a, n.20.

[10] *See* n.8 *supra*.

question even when such advocacy is found to be neither abusive nor monopolistic.

On November 7, 1978, the people will vote on the proposed Classification Amendment, without having been allowed a meaningful opportunity to hear the views of their elected local officials.[11]

The Questions are Substantial.

After this Court held in *First National Bank* v. *Bellotti*, 98 S.Ct. 1407 (1978), that corporate voices could not be silenced on referendum questions absent a showing of compelling necessity, at least one side of the public debate about property tax reform could invoke the protection of the First Amendment. But surely *Bellotti* did not contemplate that the principal advocates for the *other* side, municipal corporations and their elected officials, would promptly be silenced by state laws telling them that they too could speak — but only to of-

[11] That the referendum will probably have taken place by the time this Court considers the request for relief does not render the appeal moot any more than the same circumstances rendered the appeal moot in *Bellotti*, for this case falls squarely within the class of controversies "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). The challenged ban will continue to restrain Appellants and all municipal corporations in Massachusetts from using public funds for advocacy in any future referendum; yet "the period of time between legislative authorization of [a future referendum] proposal and its submission to the voters . . . [is likely to prove] too short . . . for appellants to obtain complete judicial review . . .." *Bellotti*, *supra*, 98 S.Ct. at 1415. Indeed, even more clearly than in *Bellotti*, "the challenged government activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974). *See id.* at 124-127; *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

ficialdom, and not to the people on referendum issues. Yet to permit the decision below to stand would be to sanction just such an unbalanced result, collapsing the dialogue protected by *Bellotti* into the monologue tolerated by the state.

In much the same spirit, the Court below transformed the protections for free speech enunciated in *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and *Wooley* v. *Maynard*, 430 U.S. 705 (1977), into a theory that would both cripple free speech and prescribe paralysis for modern government: the theory that taxpayers are entitled by the First Amendment to silence government advocacy with which they disagree. Even if the state statute upheld below were not deemed by this Court to be unconstitutional, the judgment of the Supreme Judicial Court should be set aside insofar as it rests upon so dangerous a misreading of *Abood* and *Wooley*.

Unless probable jurisdiction is noted, three of this Court's most significant modern First Amendment holdings will stand as sources of censorship and charters of governmental incapacity.

I. In Forbidding Municipal Corporations to Address the People on Referendum Questions, Chapter 55 Abridges Expression that the First Amendment was Meant to Protect.

It is established that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank* v. *Bellotti*, 98 S.Ct. 1407, 1419 (1978). *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Linmark Associates, Inc.*

v. *Township of Willingboro*, 431 U.S. 85 (1977).[12] For that reason, in striking down only last Term a state ban on corporate advocacy imposed by the same statute and closely resembling the state ban on municipal advocacy at issue here, this Court declared:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Bellotti, supra, 98 S.Ct. at 1416. If the speakers *here* were not municipal corporations, no one would suggest that the state could silence *their* speech — speech virtually identical to the speech held protected in *Bellotti*. As was true of the corporate

[12] The First Amendment rights of listeners are protected even when the speaker's claim to protection is tenuous or untenable. *Procunier* v. *Martinez*, 416 U.S. 396, 408-409 (1974) (First Amendment right of nonprisoner to receive uncensored communication independent of any right of prisoner to transmit uncensored communication); *Kleindienst* v. *Mandel*, 408 U.S. 753, 764-765 (1972) (dictum) (First Amendment right to receive information personally from foreigner independent of any right of foreigner to communicate in person with audience); *Lamont* v. *Postmaster General*, 381 U.S. 301, 305, 307 (1965) (First Amendment right to receive communication from foreigner independent of any right of foreigner to transmit such communication). Hence, even if Appellants have no independent right to speak, the people of the City of Boston and the people of Massachusetts have a right to hear the views Appellants hold on referendum questions — and Appellants may properly assert that right before this Court. *See Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.7 (1976) (school committee may assert First Amendment rights of citizens to communicate with committee, whether or not committee itself has First Amendment rights).

appellants in *Bellotti*, Appellants are permitted to spend funds on advocacy — but here only before the legislature, and never to the people on referendum issues.[13] Yet, just as in *Bellotti*, nothing in this record even suggests any finding that speech directed to the people by Appellants would drown out other voices. On the contrary, because of the holding of *Bellotti*, and given their extensive financial resources, such other voices are being heard clearly in Massachusetts, while that of Appellants has been stilled.[14]

[13] Of course, "[i]t is too late to suggest 'that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'" *Bellotti, supra*, 98 S.Ct. at 1421 n.23 (quoting from *Buckley* v. *Valeo*, 424 U.S. 1, 16 [1976]). The Court below did not deny that "the act of making political contributions and expenditures involves protected speech and not merely conduct," App. A, 16a n.15, but suggested that since the "funds . . . given to finance political expression" in this case were appropriated in violation of state statute, the instant case bears some resemblance to "the stealing of funds or of a printing press," *id.*, conduct not protected by *Buckley* v. *Valeo*, even if the thief "was planning to use the funds or the printing press to publish his views on a subject of public concern." *Id.* If the appropriation of public funds in this case violated some independently valid state prohibition, the analogy suggested by the Court below might be apt. But the only reason the appropriation is said to be in violation of state statute is that Chapter 55, as construed by the Court below, forbids the ensuing *expenditure* of the appropriated funds on referendum advocacy. Since it is the validity of that very prohibition that is the issue here, the argument of the Court below simply begged the question.

[14] *See Boston Globe*, "Business Raises $100,000 to Oppose Classification Bill," September 14, 1978, at 28 (figure reported to be but a fraction of what business community is expected to spend to defeat the amendment; a statewide coalition favoring the amendment has raised only $33,000 so far); *id.*, "Office Giving Puts Clout in Political Action," October 11, 1978, at 1 (as a result of "corporate free-speech decision," "[h]undreds of thousands of dollars in corporate contributions are pouring in for the campaign against property tax classification.") ("The First National Bank of Boston, the largest bank in New England, . . . is . . . one of the chief forces behind the anticlassification fight and has already dropped $15,000 into the campaign

coffers."). Clearly, then, this is not a case in which Appellants enjoy anything resembling a monopoly over a critical communication channel. Indeed, the Court below conceded as much when it noted that "[t]he facts in the record do not demonstrate that the . . . city's publications would be monopolistic, or even domineering." App. A, 19a, n.18. Such precedents as *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (those with exclusive access to airwaves may be forced to give equal time to opposing views), and *Bonner-Lyons* v. *School Committee of City of Boston*, 480 F.2d 442 (1st Cir. 1973) (public school committee may not exploit its exclusive access to students on school premises during hours of required attendance by disseminating antibusing notices without giving equal access to the other side), are therefore wholly inapposite; the case at bar is more closely analogous to *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (requiring newspaper to print reply *held* an invalid form of censorship). *See Bellotti, supra*, 98 S.Ct. at 1423 n.30. The state's laws appear to reflect this reality inasmuch as they permit municipalities to engage in partisan advocacy in addressing the legislature, without any suggestion that municipal funds must be expended in that context to underwrite the lobbying of the opposition. *See* App. A, 11a, n.11. And the position of the Court below was consistent with this view inasmuch as it quoted with evident approval the concession of plaintiffs below "that the mayor and persons in relevant policy-making positions in city government are free to act and to speak out in support of the classification amendment," *id.* at 23a, without any suggestion that such officials must give "equal time" in their pronouncements to the views of those who oppose the amendment. Confusion might nonetheless arise from the statement of the Court below that municipal use of "telephones and printed materials . . . and . . . facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access." *Id.* at 24a. If the Court below had in mind treating Appellants as though something akin to monopolistic power had been established — despite the contrary treatment by that Court of the Mayor and other officials, despite the state's contrary treatment of the City as a lobbyist before the legislature, and despite the absence of anything in Chapter 55 to suggest that municipal funds may be spent on referendum advocacy provided that such funds are shared with the opposition — then the question posed would be the appropriateness of extending *Red Lion* to the facts shown by this record. But since the Court below did not specify what would follow if "each side were given equal representation and access," and since there is no indication in the record that any request for such sharing has ever been made or denied, the sounder course would be to treat the judgment below as establishing a flat ban with certain exceptions, rather than to treat it as establishing an equal-time regime.

A. *The State's Ban Impermissibly Abridges the People's Right to Hear the Views of their Elected Local Officials on Pending Referendum Proposals, and to Make Informed Choices About Such Proposals.*

The people's right to know has been severely burdened by the state's ban.[15] Appellants may be free to speak, but not when the people are most likely to be listening; the state's ban prohibits municipal advocacy on a public issue only *after* it has become the subject of acute public interest as a referendum question.[16] Neither plaintiffs below nor the Supreme Judicial Court could deny that the only means for Appellants effectively to convey their views to the people is the program of spending and advocacy enjoined by the state. Given the evident disparity between the resources of those who favor the Classification Amendment and those who oppose it, it seems clear that the views of Appellants could not be conveyed to the

[15] Of course, the ban does not *absolutely* abridge the people's right to know. The mayor and certain other public officials have not been *personally* muzzled — although their freedom to speak is in uncertain. *See* App. A, 23a. And to the extent that the news media choose to report the views of Appellants when other news does not claim higher priority, the people may learn indirectly what Appellants are prohibited from communicating directly through channels financed out of public funds.

[16] Chapter 55 thus hinders the people's intelligent participation in a referendum, "a basic instrument of democratic government." *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976). And, as this Court has observed, "the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.' *New York Times Co.* v. *Sullivan*, 376 U.S. [254], 266 [1964] (quoting *Associated Press* v. *United States*, 326 U.S. [1], 20 [1945])." *Bellotti, supra*, 98 S.Ct. at 1423 n.29. The right of the voters to receive the views of Appellants is therefore vital to "a classic demonstration of 'devotion to democracy,'" as the Chief Justice has described it. *City of Eastlake, supra*, 426 U.S. at 679 (quoting from *James* v. *Valtierra*, 402 U.S. 137, 141 [1976]).

people effectively under the state's ban. While business corporations amplify their opposition to the Classification Amendment protected by *Bellotti*, municipal corporations are denied any similar opportunity by the state. Because of the unique qualifications of Appellants to speak on this particular issue — an issue going to the heart of government finance and tax structure and community well-being — it is plain that, as a result of the state's ban, much vital information about the Classification Amendment will simply not reach the people. And of course Appellants may assert the people's right to know before this Court. *See City of Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.7 (1976) (school committee may assert First Amendment rights of citizens to communicate with it).

Appellants have reason to believe that the 100 per cent valuation policy decreed by the Supreme Judicial Court in 1974 would transfer $78 million in tax burden from owners of commercial and industrial property to homeowners. App. C, 29a. Whether to amend the state constitution to avoid such a tax transfer is a question of the most far-reaching significance to the people. And it is the very sort of question about which people inevitably expect their elected local leaders to present an informed view. To frustrate the people's right to hear what Appellants have to say on this matter, and to impede Appellants' ability to say it, not only undermines the democratic values inherent in the referendum system, but prevents the people from making an informed choice vitally affecting their basic material interests.[17]

[17] In the end, representative government can only be frustrated by silencing the voices of those who are temporarily chosen by the people to govern. *See* J. Madison, *Writings* 103 (G. Hurst, ed. 1910); T. Emerson, *The System of Freedom of Expression* 698 (1970).

Chapter 55 doubly frustrates democratic values, for the people are also prevented from exercising in an informed manner their right to cast a ballot

B. *The State's Ban Impermissibly Discriminates Among Speakers.*

Bellotti freed private business corporations, political action committees, and other collective entities to address the people on pending referendum proposals. Municipal corporations alone remain censored.[18] Such a discrimination is forbidden for at least two reasons. First, any discrimination among speakers eviscerates the protection afforded by the First Amendment to speech independent of any right of the speaker. Such protection is a necessary corollary of the right to know, which is undeniably impaired by the state's ban. Yet the state's ban in this case not only forbids municipal corporations to address the people on some subjects while permitting them to address the people on others; it also forbids municipalities to address the people on issues about which, and in contexts where, other collective entities are free to speak. In *Bellotti*, *supra*, 98 S.Ct. at 1420, this Court held such discrimination inimical to the First Amendment:

for or against their elected local officials. The people cannot adequately evaluate their chosen leaders if the state keeps the people in ignorance of where those leaders stand on issues of major importance, and why. Thus, at the heart of this case is not only the people's right to know about pending referendum proposals, but their right to know as a precondition to their intelligent exercise of the franchise. *See generally Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (citizens' "ability . . . to make informed choices" esential to democracy); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966) (state's power to regulate elections stops short of power to withhold advocacy from voters); *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964) (electoral choice fundamental to exercise of all other rights).

[18] In addition, the decision below works a further discrimination by silencing the majority in order to protect a supposed interest of a dissenting taxpayer minority, *see* Parts II and III, *infra*, in violation of this Court's repeated warnings that "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ..' *Buckley*, *supra*, 424 U.S. at 48-49." *Bellotti*, *supra*, 98 S.Ct. at 1423 (footnote omitted).

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. . . . If a legislature may direct business corporations to "stick to business," it also may limit other corporations — religious, charitable, or civic — to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. [Footnote omitted.]

Not only does Chapter 55 ban organized municipal programs of advocacy while leaving other sources free to spend whatever they wish to influence a referendum vote; the ban's uncertain exceptions for speech by some municipal officers but not for others represent still further instances of discrimination among speakers by the state.[19]

Second, although this Court need not reach the point to rule for Appellants,[20] the discrimination among sources of speech in this case is impermissible because it violates the rights of municipalities as speakers. At the very least, the state may not endow its municipalities with a public voice and then selectively silence them without compelling reasons convincingly

[19] The ban evidently grants some city employees broader rights as speakers than others: the Court below appeared to agree that "the mayor and persons in relevant policy-making positions in city government are free to act and to speak out in support of the classification amendment." App. A, 23a. As for other city employees acting individually, the Court more tentatively conceded only that "[i]ndividual city employees may have certain rights of speech, even during working hours, concerning the classification amendment . . .." *Id.* And, as for other city employees acting in official concert, the Court said nothing to suggest that they would be permitted to engage in any advocacy at all.

[20] *See* n.12 *supra*.

demonstrated. The Supreme Judicial Court has specifically recognized that the state has endowed its municipalities with general home rule powers (*i.e.*, power to exercise without express authorization from the legislature any powers or functions which the legislature has authority to confer on it), App. A, 7a, including power to spend public funds on communication and persuasion, App. A, 11a n.11 (noting that cities may expend public funds to influence legislative action, and that cities are exempt from laws regulating lobbying), evidently agreeing that "the mayor and persons in relevant policy-making positions in city government are free to act and to speak out in support of the classification amendment." *Id.* at 23a. The First Amendment does not permit the state selectively to silence entities granted such broad powers of advocacy. To be sure, the status of municipal corporations in American constitutional law has long been unclear,[21] but this

[21] Ever since *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), there has been a loose notion that a state may do to its municipal corporations much that it could not do constitutionally to its private corporations, despite the fact that both are *equally* the state's "creatures." The principal cases which led to the idea that a municipality is powerless to invoke constitutional rights "in opposition to the will of its creator," *Williams* v. *Mayor of Baltimore*, 289 U.S. 36, 40 (1923), did so in connection with claims of public property, public contract, or government structure. *See, e.g., City of Trenton* v. *New Jersey*, 262 U.S. 182 (1923). But the metaphor of "municipality as creature" has not held sway in the lower courts when the municipality has asserted interests more in the nature of private property, *e.g., Proprietors of Mt. Hope Cemetery* v. *City of Boston*, 158 Mass. 509, 33 N.E. 695 (1893) (invalidating as a taking without just compensation a state statute which required the city to convey a cemetery to a private membership corporation), or personal liberty, *e.g., Town of Huntington* v. *New York State Drug Abuse Control Commission*, 84 Misc.2d 138, 373 N.Y.S.2d 728 (Sup. Ct. 1975) (recognizing standing of town to seek injunctive relief on basis of claimed privacy rights of participants in state drug abuse program).

At all events, recent decisions of this Court indicate that municipal corporations share the Tenth Amendment immunity of states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), but neither their Eleventh Amendment immunity, *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274 (1977), nor their immunity from antitrust suit, *City of Lafayette* v. *Louisiana Power & Light Co.*, 98 S.Ct. 1123 (1978), nor their immunity from suit under 42 U.S.C. § 1983. *Monell* v. *Dept. of Soc. Serv. of City of New York*, 98 S.Ct. 2018 (1978). The question whether "a municipal corporation . . . has First Amendment rights" was expressly left open in *Madison Joint School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.7 (1976). The present case affords an especially suitable occasion for consideration of that question inasmuch as no claim is made that the municipality exceeded its own charter, or its underlying grant of authority from the state, by merely undertaking to expend public funds to communicate information; rather, the state is asserting the censorial power to silence the municipal voice only on referendum issues, and only as addressed to the people themselves.

Court recognized in *Bellotti, supra*, 98 S.Ct. at 1416, not only that "[t]he inherent worth of . . . speech . . . does not depend upon the identity of its source," but also that "the States are [not] free to define the rights of their creatures without constitutional limit." *Id.* at 1417 n.14. Appellants urge this Court, in this second chapter of *Bellotti*, to affirm one such limit. No case could be more suitable for such action, since this case involves "the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243 (1936).

C. *The State's Ban Impermissibly Discriminates Among Audiences.*

Remarkably, Chapter 55 bans municipal advocacy directed to the voters in a referendum while leaving *the very same speakers* free to spend *the very same funds* to communicate *exactly the same messages* to state legislators. App. A, 11a n.11. Thus the application of the state's ban turns upon the identity of the audience to which messages are addressed. The sole

justification offered by the Court below for this discrimination was that "[m]unicipal action concerning legislation has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people." *Id.* But any basis for such discrimination either in tradition or in state law must surely fall before the overwhelming constitutional objections to its continuation. It simply turns the First Amendment upside down to suggest that the very same speech that may be addressed to the legislature may not be addressed by the same speakers to the people themselves.[22] This Court in *Bellotti, supra*, 98 S.Ct. at 1424

[22]To be sure, a selective restraint on municipal advocacy designed to ensure "fairness in the electoral process," App. A, 17a, might survive strict scrutiny — but only if its necessity were substantiated. There is little doubt, for example, that the state may impose a prior restraint (1) when necessary to protect an especially vulnerable class of listeners, *see Ginsberg* v. *New York*, 390 U.S. 629 (1968) (government may discriminate among listeners on the basis of age for the purpose of defining obscenity); *FCC* v. *Pacifica Foundation*, 98 S.Ct. 3026 (1978) (government may ban broadcast of indecent language when enough children are likely to be in audience); and (2) when the audience is captive to the speaker, *see Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring); *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting); *compare Bonner-Lyons* v. *School Committee*, 480 F.2d 442 (1st Cir. 1973) (public school committee may not distribute anti-busing notices in classrooms or on school premises during hours of required school attendance to pupils enrolled in such schools), *with Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973) (state university newspaper may advocate segregation without interference from school administration, so long as such advocacy does not imperil discipline and operation of school).

But it would surely be impermissible to suggest that the people whom Appellants seek to address with their message are unduly "vulnerable" to advocacy on issues of public concern or constitute a "captive audience," and for either reason should be "protected" from such advocacy. If the notion is merely that municipal advocacy might influence the people's decisions, it bears repeating that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. [684,] 689 [1959]." *Bellotti, supra*, 98 S.Ct. at 1423. As this Court has observed:

> [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. *Wood* v. *Georgia*, [370 U.S. 375 (1962)].

Bellotti, supra, 98 S.Ct. at 1424 (footnotes omitted).

n.31, passed a most searing judgment on such a discrimination:

> The State's paternalism evidenced by [ch. 55, § 8] is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, . . . there can hardly be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.

Especially in the context of a referendum vote on an amendment to the state constitution, which calls upon the people to make decisions that the legislature lacks the authority to make, any rule permitting Appellants to communicate *only* with the

legislature offers "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

D. *The State's Ban Impermissibly Discriminates Among Messages.*

As construed by the Supreme Judicial Court, Chapter 55 bans municipal advocacy on referendum issues — not municipal advocacy on issues that are not referendum subjects. Absent a convincing showing of compelling interest and unavoidable necessity, such a content-based discrimination violates the First Amendment.[23] As this Court said in striking down a local ordinance that permitted peaceful picketing on the subject of a school's labor-management disputes but forbade all other picketing:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Bellotti, *supra*, 98 S.Ct. at 1421 (footnote omitted).

[23] Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960), . . . "and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . .." *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976).

Police Department of City of Chicago v. *Mosley*, 408 U.S. 92, 95-96 (1972) (quoting from *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 [1964] [citations omitted]). Like a state's attempt "to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss," *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring), Chapter 55's discrimination between permissible municipal advocacy on nonreferendum issues and impermissible municipal advocacy on referendum issues is "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Id.*

Lurking within the Supreme Judicial Court's reading of Chapter 55's silent prohibition of municipal advocacy is a second forbidden content-based discrimination — a discrimination between municipal speech that is meant to inform and municipal speech that is meant to persuade. Some language in the opinion below appears to commend the expenditure of public funds "to educate and inform and to promote voting on an election issue," App. A, 14a n.13, although the Court roundly condemned "robust, partisan speech" by municipal corporations on public referendum issues. App. A, 15a. If Chapter 55 were read to provide an implied exemption for "neutral" municipal speech from its implied prohibition of municipal advocacy, such a content-based discrimination would of course be unconstitutional. "The First Amendment is a charter for government, not for an institution of learning.

'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. *Cf. Abrams* v. *United States*, 250 U.S. 616, 626 [1919], and *Gitlow* v. *New York*, 268 U.S. 652, 672 [1925], dissenting opinions of Mr. Justice Holmes." *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945).

In parsing the silence of Chapter 55, however, the Supreme Judicial Court did not expressly find any exemption for "neutral" municipal speech. Such an exemption would in any case be impermissibly vague, for no reliable distinction between neutral speech and advocacy is possible. For Appellants to disseminate leaflets pointing out that the defeat of the Classification Amendment would transfer $78 million in tax burden from business to homeowners might well do far more to secure the adoption of the amendment than a direct appeal to "Vote Yes." Thus, if the City were empowered to disseminate only "facts," the City's very choice of facts would inevitably come under fire for leaving the voters with one or another impression of the amendment — especially if the City were selecting its facts to counter clearly false impressions left by opponents of the amendment. For such a reason, this Court in an analogous context declared:

> [T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means [what the state has forbidden him to say].

Thomas v. *Collins*, *supra*, 323 U.S. at 535. And it is no answer to say that the lawfulness of municipal speech could be made to turn on its discernible *purpose* rather than on its evident *effect* on the voters. By saying *anything* that the voters did not utterly ignore, the City would be "influencing the result on the referendum question," App. A, 7a, which the court below held Chapter 55 forbids the City to do. Further, such a subjective approach would compel the legislature and the state's courts to probe the municipal mind each referendum season to assure that no city's leaders were thinking forbidden thoughts. The First Amendment could not tolerate any such regime. Just such a regime is implicit, however, in Chapter 55's decree that Appellants may not expend public funds "*for the purpose* of influencing the result of a referendum." App. A, 12a (emphasis added). For this reason as well, the state's prohibition of municipal advocacy must be held unconstitutional.

II. Chapter 55 Silences Municipal Advocacy Without Record or Legislative Findings that Such Advocacy Threatens Any Real Evil, and Ill-Serves the State's Alleged Interest in Assuring that Taxpayers are Not Compelled to Pay for Expression by Government of Views with Which they Disagree.

Just as in *Bellotti*, as Appellants have noted above, the Court below acknowledged that "[t]he facts in the record do not demonstrate that the city will abuse its alleged right of advocacy, such as by issuing deceptive, vindictive, or coercive publications, nor does the record show that the city's publications would be monopolistic, or even domineering, or that they are calculated to perpetuate any official in office." App. A, 19a n.18. Thus the Court discussed at length the

state's "strong interest in free and fair elections," *id.* at 17a, and its interest in avoiding "the possibility of a babel of municipal huckstering," *id.* at 18a, but did not purport to uphold the state's ban on municipal advocacy as a restriction demonstrably necessary to guarantee "fairness in the electoral process," *id.* at 17a. In fact, the Court even appeared to suggest that the state could not impose a "'prophylactic'" rule against advocacy by cities on "'matters closely related to their official responsibilities.'" *Id.* at 20a n.18 (quoting from Defendants' Brief at 35).[24]

The Court below instead held that Chapter 55's implied ban on municipal advocacy could withstand "the exacting scrutiny to which such a restriction must be subjected" under the First Amendment, App. A, 16a, because the ban served the state's interest in "assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree." *Id.* at 20a. Expressly "[a]ssuming that the Commonwealth has no right to restrict such advocacy where there is no opposition from any affected citizen," *id.*, the Supreme Judicial Court declared that "the

[24] Recognizing the absence of "facts in the record" to support silencing the speech in this case as necessary to assure electoral fairness, App. A, 20a n.18, the Court below did not resolve how far the state could properly go in curbing mere "possibilities of abuse," *id.*, but noted with approval a statement in Appellants' Brief below suggesting that risks of abuse "'may well warrant a prophylactic rule restricting speech by government bodies to matters closely related to their official responsibilities.'" *Id.*, quoting Defendants' Brief at 35. To suggest that a prophylactic rule of this sort *may* be warranted to prevent government bodies from speaking on subjects unrelated to their official concerns is to suggest that any such rule would clearly *not* be warranted so long as government bodies address matters within their official cognizance. Needless to say, little could be closer to the City's concern than the structure of its property tax. Thus there is no occasion here to discuss whether a legislature may direct municipal, as opposed to business, corporations "to 'stick to business,'" *Bellotti*, *supra*, 98 S.Ct. at 1420, since that is precisely what the City of Boston has done. *See also* n.32, *infra*.

Commonwealth has a compelling interest in restricting such advocacy where the affected citizenry are not in unanimity." *Id.* But Chapter 55's prohibition on municipal advocacy is anything but "closely drawn"[25] with respect to this alleged interest, and therefore is unconstitutional as a means of protecting dissenting taxpayers. For, even assuming that a ban implied by legislative silence[26] could ever be described as "closely drawn," in pursuing its alleged interest the state's ban goes too far and not far enough.

A. *The State's Ban is Over-Inclusive.*

In curtailing activity protected by the First Amendment to serve a compelling interest, a state may not operate with a bludgeon when a scalpel will do. As this Court affirmed at least twice only last Term, and as the Court below professed to acknowledge, in pursuing a compelling interest "the State must employ means 'closely drawn to avoid unnecessary abridgment . . . [of First Amendment freedoms].'" *Bellotti*, *supra*, 98 S.Ct. at 1421 (quoting from *Buckley* v. *Valeo*, 424 U.S. 1, 25 [1976] [per curiam]); *In re Primus*, 98 S.Ct. 1893, 1905 (1978); App. A, 17a.

In spite of this basic constitutional precept, the state's ban goes conspicuously farther than necessary to protect dissenting taxpayers, and thereby sacrifices protected expression without even the justification of compelling interest. The Court below itself acknowledged another less restrictive alternative to the flat ban on municipal advocacy — namely, a restriction providing "that any dissenting taxpayer should not be obliged to pay that portion of his local real estate taxes attributable to the city's political activities on the referendum proposal." App. A,

[25] See n.23, *supra*.

[26] See n.4, *supra*.

21a n.20. Yet that Court upheld the *more* restrictive alternative, noting that "[s]uch a result . . . can be achieved more effectively by striking the entire appropriation and letting those who wish to do so make their own contributions to the cause." *Id.*

No doubt by forbidding Appellants to spend *any* funds on referendum advocacy the state may avoid the problem of dissenting taxpayers "more effectively" than by forbidding Appellants to finance such advocacy out of taxes paid by dissenters or by limiting the amount Appellants may spend.[27] As this Court has observed, however, a state's choice of a limitation on the exercise of a protected activity may not ignore the fact that "it is the character of the right, not of the limitation, which determines what standard governs the choice." *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). The state has not met its burden of showing either that a flat ban on municipal advocacy is necessary to protect dissenting taxpayers, or that any sacrifice of effectiveness entailed by adopting a less restrictive alternative would outweigh the increment in First Amendment protection gained by requiring such an alternative. As this Court has repeatedly held, "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .' *Buckley, supra*, 424 U.S. at 48-49." *Bellotti, supra*, 98 S.Ct. at 1423. Hence the justification advanced by the Court below for the state's over-reaching ban must fall.[28]

[27] See nn.8-9, *supra*.

[28] The ban is over-inclusive in one final respect. As the Court below recognized, the legislature did not limit its ban to municipal advocacy undertaken in the face of a dissenting taxpayer minority but forbade municipal advocacy undertaken even with unanimous taxpayer assent. Such over-

B. *The State's Ban is Under-Inclusive.*

Chapter 55's ban on municipal advocacy does not merely sacrifice protected expression needlessly. In doing so, it actually fails to protect dissenters, in whose name the ban has been upheld. As was the case with respect to advocacy by private corporations in *Bellotti, supra*, 98 S.Ct. at 1424-1425, municipal expenditures with respect to a referendum are prohibited, while municipal activity with respect to the passage or defeat of legislation is permitted. Nor does Chapter 55 prohibit a municipality from expressing its views, by the expenditure of public funds, on any public issue until it becomes the subject of a referendum — though the displeasure of disapproving taxpayers is unlikely to be any less.[29]

In short, the state's ban protects dissenting taxpayers from an "injury" that municipal corporations remain free to inflict upon them in numerous ways other than by those means proscribed by the ban. Indeed, such a result is inescapably presented by the Supreme Judicial Court's recognition that "there are a variety of instances in which government funds are used lawfully to express views and conclusions on matters of importance where various taxpayers may disagree with those views and conclusions." App. A, 14a-15a. The under-inclusiveness of the state's ban thus seriously casts into question "the likelihood of a genuine state interest in protecting [dissenting taxpayers]." *Bellotti, supra*, 98 S.Ct. at 1425. Under the state's regime, dissenting taxpayers are at best inadequately protected, while "the free dissemination of ideas [is] the loser." *Smith* v. *California*, 361 U.S. 147, 151 (1959).

inclusiveness is striking because the Court expressly assumed that "the Commonwealth has no right to restrict such advocacy where there is no opposition from any affected citizen." App. A, 20a.

[29] *See Bellotti, supra*, 98 S.Ct. at 1425.

III. Appellants' Proposed Advocacy has been Enjoined on the Erroneous Theory that Dissenting Taxpayers Have a First Amendment Right to Prevent Government Expression of Views with Which they Disagree.

Beyond asserting a state "*interest* in assuring that a dissenting minority of taxpayers is not compelled to finance the expression of views with which they disagree," App. A, 20a (emphasis added), the Supreme Judicial Court in fact upheld a federal *right* on the part of such dissenting taxpayers,[30] although the theory underlying such a right endangers the wide variety of publicly funded activities that express controversial points of view.[31] The Court below reasoned (1) that

[30] The Supreme Judicial Court referred to no state law, policy, or decision in support of this alleged interest; it simply cited *Abood* and *Wooley* and sought to show that the case before it was analogous.

[31] Private civic leagues, with functions closely paralleling those of municipal corporations, for example, enjoy tax exemption under I.R.C. § 501(c)(4), and do not lose such status when they promote action by the public in a referendum involving a proposed amendment to the state constitution. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). If municipal corporations are to be silenced by the state to protect dissenters' rights, must not such civic leagues be silenced as well? The Court below was concerned with *any* use of "public tax revenues to advocate a position which certain taxpayers oppose." App. A, 19a. But then must not public universities, even public television, be silenced? The Massachusetts Mayors' Association, a voluntary but publicly-funded organization of mayors, lobbies for legislative action deemed to further municipal purposes, and acts to influence the vote of the people on referendum proposals of municipal concern. (Recognizing the implications for such activities of the judgment below, that Association will be filing a motion for leave to submit an *amicus* brief urging this Court to note probable jurisdiction.) Even charitable and religious organizations and others funded directly through tax-exempt contributions and indirectly through federal "tax expenditures," *see* S. Surrey, *Pathways to Tax Reform* (1973), are not immune from the theory on which the Supreme Judicial Court rested its holding. The fact that the Court recognized "instances in which government funds are used to express views and conclusions where various taxpayers may disagree," App. A, 14a-15a, can only mean that the Court shrank from

the case before it was "analogous to *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235-236 (1977), where the Supreme Court struck down involuntary contributions by government employees to a union's political expression," App. A, 20a-21a (footnote omitted); and (2) that neither *Abood* nor *Wooley* v. *Maynard*, 430 U.S. 705 (1977), could successfully be distinguished "from situations in which a taxpayer is compelled to contribute to a State's message with which the taxpayer disagrees." App. A, 21a n.19.

But any analogy drawn between this case and *Abood* and *Wooley* surely cuts the other way. In *Abood*, this Court *refused* to enjoin union advocacy over a claim that the rights of dissenters required just that. And in *Wooley*, this Court tacitly accepted Justice Rehnquist's observation in dissent that citizens of New Hampshire could of course be compelled to pay, through their taxes, for the cost of erecting and maintaining billboards proclaiming "Live Free or Die," even if they could not be compelled to display that proclamation on their own license plates. 430 U.S. at 721.

The Supreme Judicial Court's inversion of the *Abood* and *Wooley* holdings was both dangerous and unwarranted. The essence of rule by temporary majorities, in a system financed by taxation, is that all must share in the costs of government choices — including government-sponsored messages — with which many may disagree. Legislative committees routinely use public funds to print reports advocating passage of controversial legislation; the President spends public funds to persuade the Congress and the Nation to enact his program; a mayor is paid from public funds as he addresses the city; opinions of courts, often non-unanimous, are published at taxpayers' expense. All of these activities serve the public purpose

accepting the full implications of its own views and preferred selective silencing to the universal censorship that logic would seem to dictate.

of informing the citizenry and enabling the electorate to evaluate both issues and officials. Indeed, such activities are essential to informed exercise of the ballot. The fact that some of the recipients of information conveyed by government, like some of the taxpayers whose funds are used to disseminate it, disagree with the views expressed therein or stand to lose if those views prevail no more relieves them as taxpayers of a duty to share in the costs of dissemination than it denies them as citizens and voters a right to share in the benefits of more informed participation in the democratic process.

To say that government financing of political programs or positions violates some constitutional mandate of neutrality is to prescribe total paralysis for the modern state. It is only with respect to religion that government is constitutionally commanded to be neutral; as this Court pointed out in *Buckley* v. *Valeo*, 424 U.S. 1, 92-93 (1976), the use of "public money to facilitate and enlarge public discussion," even through the device of supporting some but not all political parties or messages, "furthers, not abridges, . . . First Amendment values" so long as government avoids entanglement with religion. As the Fourth Circuit declared in upholding a state university newspaper's right to advocate racial segregation contrary to the Fourteenth Amendment and the Civil Rights Act of 1964:

> Neither federal nor state governments may expend funds to establish a religion. The First Amendment, however, contains no similar ban against speech or press. Both governments may spend money to publish the positions they take on controversial subjects. The speeches and publications that originate in government offices attest to the diversity of views that are freely expounded.

Joyner v. *Whiting*, 477 F. 2d 456, 461 (4th Cir. 1973). *See also Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 97 (1976) (township may advocate integrated housing by publicizing number of whites remaining in township, and may "create inducements to retain individuals who are considering selling their homes").

The proposition that government must maintain a neutral posture in *regulating* private expression has never meant, and could not mean, that government cannot *add its own voice*, necessarily at public expense, to the many it must tolerate — provided that it does not drown out private speech. And it bears repeating that the Court below expressly found that Appellants' speech posed no such threat.

Thus it is hardly surprising that this Court has never recognized a right of taxpayers to prevent the government from pursuing or advocating policies with which they merely disagree. Having elected representatives to expend tax revenues for such public purposes as they see fit, taxpayers may insist only that such revenues not be appropriated for purely private ends.[32] And, even in a situation so extreme as to

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[32] Individuals who are forced by law to help defray the expenses of such specialized entities as labor unions may object to the use of their contributions for political purposes unrelated to the collective bargaining activities whose existence justifies coerced contributions, *see Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and *Int'l Assoc. of Machinists* v. *Street*, 367 U.S. 740 (1961), but not to the use of their contributions for advocacy activities germane to "'the cause which justified bringing the group together,'" for as to such activities "'[t]he furtherance of the common cause leaves some leeway for the leadership of the group,'" and "'the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'" *Abood*, *supra*, 431 U.S. at 222-223 (quoting from *Machinists*, *supra*, 367 U.S. at 778 [Douglas, J., concurring]).

Properly understood, this principle defeats rather than supports the "dissenting taxpayers" theory that the Court below found compelling. Recognizing "that there may well be situations in which a public purpose would be served by municipal advocacy," App. A, 10a, n.10, the Court below did

warrant taxpayer invocation of *Abood* or of *Wooley*, there can be no federal constitutional right to *halt* government advocacy at a dissenter's behest, but at most a right of dissenters to resist contribution toward such advocacy.

In any event, whatever the outer reaches of the protection for dissenters recognized in *Abood* or *Wooley*, the attempt by the Court below to bring the facts of this case within that sphere espouses a principle this Court should emphatically repudiate. The decision below invites wholesale attack upon the broad spectrum of government advocacy, and even of advocacy by charitable corporations and others funded by tax revenues. As such, the questions presented are even more

"not pass on the plaintiffs' . . . claim that the appropriation of funds to be spent in support of the adoption of the classification amendment is not a constitutionally permissible public purpose." *Id.* Given the recognition by the Court below that municipal advocacy of changes deemed by the city's leaders to be in the city's interests is in effect one of the categories of activities "which justifies bringing the [city] together," *Machinists*, *supra*, 367 U.S. at 778 (Douglas, J., concurring); *see* App. A, 11a, n.11, the proper analogy is between such advocacy and ideologically-oriented collective bargaining activities — *not* between such advocacy and ideological campaigning unrelated to collective bargaining.

To be sure, the Court below did suggest hypothetically that, if it were to apply a certain theory of governmental expression, it would describe municipal advocacy on the Classification Amendment as outside the city's "governmental function." *Id.* at 18a, n.16. But that remark was entirely hypothetical and contradicted the Courts' plain indication that the state could not impose a ban on municipal advocacy directed to matters closely related to a city's official concerns simply to avoid all possibility of abuse. *See* n.24, *supra*. In any event, a state court should not be permitted to confer upon dissenting taxpayers federal constitutional rights they would not otherwise possess merely by labelling as beyond a government's "function" the activity of advocating a referendum position — at least if the state's own law plainly makes such advocacy by the same entity proper where the audience is the legislature rather than the people, *see* App. A, 11a, n.11, and makes public spending to disseminate information on nonreferendum subjects proper even where the audience is the general public. *See* nn.7, 8, *supra*.

substantial than they were in *Bellotti*, and the need for plenary review by this Court even clearer.[33]

Conclusion.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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October 17, 1978

[33] If the decision below had rested solely on what Appellants believe to be an erroneous extension of *Abood* and *Wooley*, and not at all on the rejection of Appellants' First Amendment challenge to Chapter 55, then the remaining federal issue in this case — the third of the "Questions Presented" — would be properly before this Court on certiorari rather than on appeal. But since this case is properly here on appeal under 28 U.S.C. § 1257(2), this Court may "take jurisdiction over any aspects of the case which would otherwise fall solely within [its] certiorari jurisdiction." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 487 n.14 (1975); *accord*, *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922) (Judicial Code).

Appendix A.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 1513.

RICHARD L. ANDERSON & others[1] *vs.* CITY OF BOSTON & others.[2]

Suffolk. July 13, 1978. — August 23, 1978.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, & ABRAMS, JJ.

Municipal Corporations, Expenditure to influence elections, Constitutional protection. *Elections*. *Constitutional Law*, Political contributions, Elections, Freedom of speech and press.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on June 23, 1978.

The case was reported by *Wilkins*, J.

Harold Hestnes (*John G. Fabiano* & *Kenneth R. Berman* with him) for the plaintiffs.

Laurence H. Tribe (*Harold J. Carroll*, Assistant Corporation Counsel, & *Herbert P. Gleason*, Corporation Counsel, with him) for City of Boston & others.

WILKINS, J. The plaintiffs, eleven taxable inhabitants of the city of Boston (city), seek a declaratory judgment pursuant to

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[1] The other plaintiffs are George M. Burke, Donald G. Colony, Robert L. Hughes, Jr., Andrew A. Hunter, Arnold London, Frank Remick, Edward N. Wadsworth, Richard Wait, Thomas R.B. Wardell, and William M. Yates.

[2] The other named defendants are Kevin H. White, mayor of Boston; the nine members of the city council; James V. Young, collector-treasurer of the city and deputy mayor for fiscal affairs; James Hyde, first assistant collector-treasurer of the city; and John Weis, director of the Office of Public Information on Classification.

An appearance and an amended answer have been filed on behalf of all named defendants except four members of the city council. We shall refer to the defendants who joined in the amended answer as the defendants.

G. L. c. 231A, and equitable relief pursuant to G. L. c. 40, § 53, concerning the legality of certain actions contemplated by the city in support of a referendum proposal which will be presented to the people at the November, 1978, general election. The referendum proposal concerns an amendment (the classification amendment) to Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth which would authorize the Legislature to "classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same class" and to grant reasonable exemptions. Currently, except for reasonable exemptions (*Assessors of W. Springfield* v. *Eastern States Exposition*, 326 Mass. 167, 170 [1950]), it is constitutionally impermissible for a municipality to assess various classes of real property disproportionately in relation to the properties' fair cash value. Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. See *Weinstock* v. *Hull*, 367 Mass. 66, 69, appeal dismissed, 423 U.S. 805 (1975); *Opinion of the Justices*, 344 Mass. 766 (1962).

The complaint was filed in the Supreme Judicial Court for the county of Suffolk on June 23, 1978. A hearing was held on June 28, 1978, on the question of the issuance of a preliminary injunction. The defendants stipulated that they would not expend certain appropriated funds. A single justice reserved and reported the case for determination by the full court on the pleadings and a statement of agreed facts.

We summarize the material facts agreed to by the parties. On May 30, 1978, the mayor submitted a proposed ordinance to the city council (council), which the council passed by a five-to-four vote on June 7, 1978. That ordinance authorized, subject to appropriation, the expenditure of city funds "for the purposes of providing educational materials and disseminating information urging the adoption by the people of a proposed amendment to the Massachusetts Constitution relating to the

classification of property for purposes of taxation."[3] On May 31, 1978, the mayor submitted to the council an appropriation request for funds for the purpose of funding an "Office of Public Information on Classification." On June 7, 1978, again by a five-to-four vote, the council passed an order appropriating $975,000, to be raised by taxation (G. L. c. 59, § 23), for the expenses of the Office of Public Information on Classification.[4] The mayor approved the ordinance and the appropriation order on June 23.

The mayor has organized the Office of Public Information on Classification "for the purpose of collecting and disseminating information about the impact of 100% valuation on the residents of the City and on the potential of the classification amendment to mitigate that impact." That office would include in its information the fact that the city urges the voters to approve the classification question. It is encouraging the formation of a group of unpaid citizen volunteers to assist in the collection and dissemination of information concerning the classification amendment. The city intends to provide office space and telephones to the volunteers to enable them "to augment the City's efforts." The city will provide printed materials at its expense for distribution to the voters. Some city employees have volunteered to serve full time on the staff of the office as part of their official duties. Others have volunteered to devote part of their time during regular city business hours aiding the operations of the office. The mayor

[3] The ordinance forbids the use of any such funds for the promotion of any individual. No public official may have his name or picture "individually displayed on any so-called educational material."

[4] Of the amount appropriated, $475,000 is subject to further approval of the council before it may be expended. The appropriation order also states that "should a permanent injunction be granted to any parties contesting the legality of this appropriation, then any funds not encumbered or spent shall be returned immediately to the City Treasury."

initially requested city department heads to spend three hours each day "in this effort" in addition to their regular duties.

"Studies conducted by the City indicate that the implementation of 100% valuation in the City will effect a transfer of tax burden from commercial and industrial property to residential property in a gross amount of approximately $78,000,000. This transfer will practically double the tax burden on many single family homes in the City, increasing the tax on them by over $1,000." Other studies indicate that, "while many Boston voters understand the impact of 100% valuation on their taxes, few were acquainted with the Classification Amendment or had any idea of its possible impact in mitigating the effects of 100% valuation." There are persons and interests opposed to the passage of the classification amendment who will work to defeat it and who are raising funds from individuals and corporations for that purpose.

On June 30, 1978, the city paid an assessment of $112,550 to the Massachusetts Mayors' Association as its share of $500,000 which that association seeks to use for a Statewide information campaign on the classification amendment. On June 28, 1978, the city executed two contracts which were filed with the city auditor. One, with Lee-Grigsby Associates in the amount of $123,000, provides for instruction to volunteers in effective voter communication about the classification amendment. On June 29, 1978, the city made a payment of $10,000 on that contract for work already performed. The other contract, in the amount of $100,000, calls for Butcher-Forde Consulting to conduct a study of the level of public understanding on the classification issue and to design informational materials and a strategy for their distribution. No payments have been made on this contract.

Funds to meet the city's obligations to the Massachusetts Mayors' Association and to Lee-Grigsby Associates and Butcher-Forde Consulting "were transferred from the Public

Facilities Department to the Administrative Services Department by the City Auditor on June 28 and 29, 1978, with the approval of the Mayor under section 3B of the City Charter (St. 1909, c. 486)." The fiscal 1978 budget had no funds expressly designated for expenditures on behalf of the classification question. Because of the conclusions we reach, we need not decide whether the transfer of funds was authorized by the city charter.

The full court heard argument on July 13, 1978, and, on July 19, 1978, entered an order which is set forth in the margin.[5] That order enjoined the city from expending the funds appropriated for the Office of Public Information on Classification and from making payments pursuant to the contracts, described above, which were executed on June 28, 1978.

This opinion is in explanation of that order.

We conclude that (1) the city does not have authority to appropriate funds to be expended in support of the classification amendment, and (2) the First Amendment to the Constitution of the United States, applicable to the States through the Fourteenth Amendment, does not require that the city be authorized to appropriate funds to influence the result of the vote on the classification amendment. We consider first the city's ap-

[5] "The City of Boston, its agents and employees, are enjoined from expending the funds appropriated by the city council on June 7, 1978, to meet the current expenses of the Office of Public Information on Classification and are further enjoined from making payments to Lee-Grigsby Associates or to Butcher-Forde Consulting pursuant to the contracts between those entities and the City of Boston, which contracts were executed and filed with the City Auditor on June 28, 1978. This order should not be construed as implied authority for the city to use municipal employees or to use other appropriated funds for the purpose of supporting the proposed classification amendment. No municipal officer or employee may be required or compelled to devote time during his or her regular working hours to solicit public support for the proposed classification amendment."

propriation authority, then consider the Federal constitutional question, and finally discuss the plaintiffs' requests for relief.

1. A municipality has no authority to appropriate funds for the purpose of taking action to influence the result of a referendum proposed to be submitted to the people at a State election. We reach this conclusion on the basis of the existence of broad regulatory legislation concerning the collection and expenditure of funds for election purposes.

We do not rest the result on the plaintiffs' claim that municipalities are restricted to appropriating funds solely for those purposes enumerated in G. L. c. 40, § 5. Section 5 of G. L. c. 40, as amended by St. 1951, c. 798, provides that a municipality may "appropriate money for the exercise of any of its corporate powers, including the following purposes: [listing numerous purposes]."[6] Neither as a matter of statutory construction nor in practice are municipal appropriations limited to those purposes enumerated in G. L. c. 40, § 5. There are other statutory provisions explicitly authorizing the appropriation of funds. See, e.g., G. L. c. 40, § 5A (reserve funds in cities); § 5B (stabilization funds); § 6A (limited amounts for advertising the municipality's resources, advantages, and attractions). Moreover, there are traditional municipal functions for which funds have been appropriated without any explicit statutory authorization beyond the general authorization to expend funds "for the exercise of any of its corporate powers." Contrary to the plaintiffs' contention, the Legislature has not manifested an intention after the enactment of the Home Rule Amendment in 1966 (art. 89 of the Amendments to the Constitution of the Commonwealth, amending art. 2 of those Amendments) to limit the appropriation powers of municipalities to those purposes which are mentioned explicitly in legislation.[7] See *Bloom* v. *Worcester*, 363 Mass. 136, 155-156 (1973).

[6] G. L. c. 40, § 5, refers to towns, but except as otherwise expressly provided, "all laws relative to towns shall apply to cities." G. L. c. 40, § 1.

The Home Rule Amendment authorizes a municipality by ordinance or by-law to "exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight" of the Home Rule Amendment, provided the municipality's ordinance or by-law does not run contrary to its charter.[8] See art. 2, of the Amendments to the Massachusetts Constitution, as appearing in art. 89, § 6. See also § 13 of G. L. c. 43B, the Home Rule Procedures Act, to the same effect. The issue at the heart of the dispute concerning the city's authority to appropriate funds for the purpose of influencing the result on the referendum question is whether the city's purported home rule ordinance is inconsistent with any law enacted by the Legislature under the powers reserved to it under the Home Rule Amendment. On this point, we agree with the plaintiffs that the appropriation of funds by a munici-

[7] The plaintiffs argue that the Legislature must have intended G. L. c. 40, § 5, to be exhaustive on the subject of municipal appropriations because it has made additions to the list of permitted appropriations since adoption of the Home Rule Amendment. However, that conclusion is not required. Some recent additions may have been made to eliminate the need for the adoption of individual home rule ordinances and by-laws. Others contain restrictions on amounts which may be appropriated for particular purposes.

[8] The Home Rule Amendment disclaims any intention "to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four [relating to charter commissions and charter amendments]." Art. 2, of the Amendments to the Constitution, as appearing in art. 89, § 7. It may be that the absence of authority to adopt a home rule ordinance or by-law regulating elections should be read as denying local authority to attempt to "regulate" the results as well as the procedures of elections. We need not decide this point because, even if art. 2, § 7, does not nullify any authority in art. 2, § 6, to enact the home rule ordinance before us, the result would be the same.

pality for the purpose of influencing the vote on a Statewide referendum question is "inconsistent with . . . laws enacted by the general court." We reach this result because comprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing manifests an intention to bar municipalities from engaging in the expenditure of funds to influence election results. G.L. c. 55, as appearing in St. 1975, c. 151, § 1. This comprehensive legislation requires the reasonable inference that the Legislature "intended to preclude the exercise of any local power or function on the same subject because otherwise the legislative purpose of that statute would be frustrated." *Bloom* v. *Worcester*, *supra* at 155.

Chapter 55 is a detailed enactment entitled, "Disclosure and Regulation of Campaign Expenditures and Contributions." Its stated purposes are "to provide for public disclosure of political contributions and expenditures, and the regulation of said contributions and expenditures." See St. 1975, c. 151. "Expenditure" is defined to include an expenditure by a political committee "for the purpose of promoting or opposing a . . . referendum question . . . or other question submitted to the voters." § 1. That chapter regulates political committees which are defined to include "any committee, association, organization or other group of persons, . . . which . . . makes expenditures . . . for the purpose of opposing or promoting a . . . referendum question . . . or other question submitted to the voters." *Id.* It regulates the expenditure of money by such a committee (G.L. c. 55, §§ 5, 6, 9), and sets forth detailed reporting requirements (G.L. c. 55, § 18). Chapter 55 also places restrictions on the expenditure of funds by corporations, making explicit reference to various kinds of corporations, although not to a municipal corporation. § 8.[9]

[9] One restriction concerning the expenditure of corporate funds on a referendum question was held to be unconstitutional by a five-to-four vote in

We interpret G.L. c. 55 as intended to reach all political fund raising and expenditures within the Commonwealth. The absence of any reference to municipal corporations is significant, not as an indication that municipal action to influence election results was intended to be exempt from regulation, but rather as an indication that the Legislature did not even contemplate such municipal action could occur. We notice judicially that traditionally municipalities have not appropriated funds to influence election results. If the Legislature had expected that municipalities would engage in such activities or intended that they could, G.L. c. 55 would have regulated those activities as well. We thus construe G.L. c. 55 as preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a State election.

Our conclusion that municipalities are barred from political activities of the character involved here is strengthened by other provisions of G.L. c. 55. Section 13 forbids a municipal employee (among others), other than an elected officer, from soliciting or receiving any payment of money for any political purpose whatever. No person shall solicit or receive any payment of money for such a purpose in a building occupied for municipal purposes. G.L. c. 55, § 14. Generally, no person in the service of a city shall deliver to another such person any money to be applied to "the promotion of any political object whatever." G.L. c. 55, § 15, as appearing in St. 1975, c. 151, § 1. Literally, these prohibitions apply to money appropriated by a municipality as fully as they do to funds derived

First Nat'l Bank v. *Bellotti*, U.S. (1978) (98 S. Ct. 1407 [1978], reversing *First Nat'l Bank* v. *Attorney Gen.*, Mass. (1977) (Mass. Adv. Sh. [1977] 134).

from any other source. Even if these restrictions should not be construed as affecting municipal appropriations, they demonstrate a general legislative intent to keep political fund raising and disbursing out of the hands of nonelective public employees and out of city and town halls.[10]

The defendants have brought to our attention St. 1978, c. 572, which was signed by the Governor on July 22, 1978, after the argument of this case. This Act, which is not effective until ninety days from July 22, 1978 (art. 48, The Referendum, I), inserts G.L. c. 55, § 22A. Section 22A requires the treasurer of each municipality which has "given, paid, expended or contributed, or promised to give, pay, expend or contribute any money or any valuable thing in order to influence or affect the vote on any question submitted to the voters of the commonwealth . . . [to] file reports with the director [of campaign and political finance] setting forth the amount or value of every gift, payment, expenditure of [*sic*] contribution

[10] We need not pass on the plaintiffs' further claim that the appropriation of funds to be spent in support of the adoption of the classification amendment is not a constitutionally permissible public purpose. The adoption of the classification amendment would not produce by itself any additional revenue for the city. Assuming that any legislation implementing the classification amendment were to create classifications potentially favorable to single family residences or owner-occupied premises (a likely assumption), the pattern of disproportionate assessments extant in Boston might not be substantially disrupted. Thus the city's support of the classification amendment might be viewed as an attempt to legitimatize its admittedly unconstitutional assessment practices. But, as we have said, we do not have to decide whether the expenditure of municipal funds in support of the classification amendment is a public purpose. We recognize, however, that there may well be situations in which a public purpose would be served by municipal advocacy. We would give, of course, considerable deference to legislative findings concerning the existence of a public purpose in such situations. See *Opinion of the Justices*, 337 Mass. 777, 781 (1958).

We also need not pass on the plaintiffs' claims that the proposed use of municipal funds violates equal protection and due process principles expressed in the constitutions of the United States and of the Commonwealth.

or promise to give, pay, expend or contribute, together with the date, purpose, and full name and address of the person to whom it was made." Criminal penalties are provided for any governmental officer who violates any provision of the section. The director "may order restitution of public funds which have been adjudicated to have been spent contrary to law by public officials." The section provides expressly that "[n]othing contained herein shall be construed as authorizing the expenditures of public monies for political purposes."

Clearly, St. 1978, c. 572, does not authorize the expenditures in issue here. Not only is it not yet effective, but we find in it no implication that municipalities may expend public funds to influence or affect the vote on a Statewide referendum. The requirement that a municipal treasurer report all expenditures of public funds for such a purpose does not mean that the Legislature has altered its position barring the use of such funds for political purposes. The section seemingly disclaims such an inference. Moreover, it acknowledges that there may be adjudications that such funds may have been spent contrary to law and authorizes the director to order restitution of such funds.[11]

[11] We are not concerned here with the First Amendment or other right of a municipality to expend public funds to influence legislative action. Municipal action concerning legislation has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people. There is express authorization for the use of public funds for the purpose of influencing the legislative process. See G.L. c. 40, § 5 (15), relating to employment of counsel to appear before a committee of the Legislature. See also G.L. c. 3, § 50, as amended by St. 1976, c. 458, § 4, which exempts municipal employees and agents "who are acting in their capacity as such employees or agents" from legislation regulating lobbying. Moreover, quite apart from legislative authorization, there is a tradition of localities acting through their officials and employees to obtain legislative action in their favor. Indeed, the Home Rule Amendment itself contains procedures by which an individual city or town may seek legislative authorization for particular action by it. Art. 2, of the Amendments to the Massachu-

2. We turn then to the defendants' assertion that, even in the presence of a legislative direction that no municipal funds be expended for the purpose of influencing the result of a referendum, the city has a First Amendment right to expend public funds in an attempt to obtain an affirmative vote on the classification amendment.

We are offered little assistance from prior decisions. Although for more than fifty years the due process clause of the Fourteenth Amendment has protected liberty of speech from invasion by State action (see *Gitlow* v. *New York*, 268 U.S. 652 [1925]; *First Nat'l Bank* v. *Bellotti*, U.S. , [1978]) [98 S. Ct. 1407, 1417 (1978)], there has been almost no judicial consideration of the impact of rights of freedom of speech on the right of State or local governments to use public funds to advocate a position on a question being submitted to the voters.[12] The only relevant opinion of which

setts Constitution, as appearing in art. 89, § 8. The city did not avail itself of that opportunity in this instance.

[12] Various opinions have held, without discussion of the possible impact of constitutional principles of freedom of speech, that a municipality or a similar political subdivision may not expend public funds for the purpose of influencing the result on an election question. See *Mines* v. *DeValle*, 201 Cal. 273 (1927) (bond issue); *Elsenau* v. *Chicago*, 334 Ill. 78 (1929) (bond issue); *Porter* v. *Tiffany*, 11 Ore. App. 542 (1972) (referendum on bond issue and initiative measure). Cf. *Sims* v. *Moeur*, 41 Ariz. 486 (1933) (use of State workmen's compensation fund to oppose initiative measure); *Stanson* v. *Mott*, 17 Cal. 3d 206 (1976) (use of State funds to promote a bond issue). A California statute authorizes a local legislative body to file for publication a written argument for or against any measure going before the municipal voters. See *Ferraro* v. *Belanger*, 18 Cal. 3d 253 (1976).

In 1946, by an eight-to-four vote, the Court of Errors and Appeals of New Jersey held that "a municipality may lawfully publicize, at public expense, what its governing body conceives to be sound reasons, relating to the essential local welfare, for the rejection by the people of the state of proposed amendments to the constitution." *City Affairs Comm. of Jersey City* v. *Commrs. of Jersey City*, 134 N.J.L. 180 (1946). Here, again, the focus was on the authority of a political subdivision. No mention was made of the First

we are aware is that of a New York trial court which preliminarily enjoined the division of human rights of the State of New York and its commissioner from "supporting, promoting, campaigning or otherwise acting to achieve passage of the proposed Equal Rights Amendment to the New York State Constitution." *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 453 (N.Y. Sup. Ct. 1975). The court concluded that defendants had no statutory authority to engage, as public officials or employees, in activities in support of the Equal Rights Amendment and rejected the defendants' argument that an injunction would abridge their rights of freedom of speech and association.[13]

Amendment, although the court's discussion on informing and advising the the electorate is relevant to First Amendment principles. In *Citizens to Protect Public Funds* v. *Board of Educ. of Parsippany-Troy Hills*, 13 N.J. 172 (1953), the Supreme Court of New Jersey, in an opinion by now Mr. Justice Brennan of the United States Supreme Court, discussed the use of municipal funds to seek support for a school bond issue. The court imposed a significant limitation on the broad principle expressed seven years earlier by the former Court of Errors and Appeals, saying, "We are persuaded, however, that simple fairness and justice to the rights of dissenters require that the use by public bodies of public funds for advocacy be restrained" in the absence of express legislative authorization. *Id.* at 182. The court indorsed the use of public funds for the expression of views pro and con. "It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale." *Id.* As in other cases, the impact of First Amendment principles was not addressed. In 1947, Professor Chafee observed that government as a party to communications "is a subject hitherto neglected." 2 Z. Chafee, Jr., Government and Mass Communications 723 (1947). He put, but did not answer, the question: "How far is it right that the money of the taxpayers, especially those in the opposite party, should be spent, in a way, as a subtle campaign fund?" *Id.* at 763. As we have noted, until this case, the subject of government as a party to communications has continued generally to be neglected in its constitutional aspect. See *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.7 (1976), where the Court did not have to decide whether a municipal corporation had First Amendment rights to hear the views of citizens and employees.

[13] The court said the issue was "not one concerning freedom of speech or association, but whether it is a proper function of a State agency to actively

We abstain from expressing the issue before us in terms of whether a municipality "has" First Amendment rights and what the scope of those rights may be. "Instead, the question must be whether [the Commonwealth's denial of the right to the city to expend funds in support of the classification amendment] . . . abridges expression that the First Amendment was meant to protect." *First Nat'l Bank* v. *Bellotti*, U.S. , (1978) [98 S. Ct. 1407, 1415 (1978)]. In other words, is speech of the character involved here, expressed by a political subdivision of a State, speech which the First Amendment was intended to protect? The First Amendment, of course, restrains States from barring others from expressing ideas. By its terms and in its traditional applications, the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination. There are, no doubt, constitutional restrictions on governmental speech even where the subject under discussion is one at the heart of the First Amendment's protection.[14] On the other hand, there are a variety of in-

support a proposed amendment to the State Constitution which is about to be presented to the electorate in a State-wide referendum." *Id.* at 449-450. In language of such force as to suggest that a statute authorizing partisan advocacy would be of doubtful constitutionality, the court said that the democratic process would be demeaned by the advocacy by State agencies, a practice which "cannot be tolerated, directly or indirectly in these democratic United States of America." *Id.* at 452. It accepted the concept of public funds being used to educate and inform and to promote voting on an election issue, and recognized that public employees could argue for or against a proposition in their individual capacities as private citizens.

[14] Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material. Government domination of the expression of ideas is repugnant to our system of constitutional government. In this Com-

stances in which government funds are used lawfully to express views and conclusions on matters of importance where various taxpayers may disagree with those views and conclusions. The Constitution of the United States, thus, does not forbid all government communications and publications which are not neutral and purely informative. We need not explore, however, how far constitutional considerations may limit the Federal and the State governments from expending otherwise lawfully appropriated funds to advance a partisan position by publication of documents and advertisements in support of that view. Here, we are presented with the issue whether constitutionally protected speech includes the right of a municipality to speak militantly about a referendum issue of admitted public importance where the Legislature of the State has said it may not. The Supreme Court has left open the possibility that restrictions on speech would be valid as to private corporations which would not be valid as to individuals. *First Nat'l Bank* v. *Bellotti*, U.S. , n.13 (1978) [98 S. Ct. 1407, 1416 n.13 (1978)]. Although we suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision to disregard the mandate of the supreme legislative authority of the State, no matter how important the topic desired to be placed under discussion and even in the absence of a compelling State interest in suppressing discussion, we need not resolve this point. Even if we were to assume that the appropriation of funds by a municipal corporation to engage in robust, partisan speech is expression that the First Amendment was meant to protect, there are demonstrated, compelling in-

monwealth, we might find a constitutional bar to such an attempt at political self-perpetuation in art. 9 of the Declaration of Rights of our Constitution, concerning free elections, and in considerations of equal protection and due process of law.

terests of the Commonwealth which justify the "restraint" which the Commonwealth has placed on the city.[15]

In this phase of our analysis we assume that the expenditure of municipal funds to promote adoption of the classification amendment involves expression protected by the First Amendment, and we conclude that a State-imposed restriction on such an expenditure survives the exacting scrutiny to which such a restriction must be subjected. See *First Nat'l Bank* v. *Bellotti*, *supra* at [98 S. Ct. at 1421].

In assessing the government's interest in regulating speech, the right to speak or to be heard must be measured by a balancing of interests. See *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). For example, the constitutional rights of government employees to participate in partisan political activities "cannot be defined independent of the contexts in which they are asserted." L.H. Tribe, American Constitutional Law § 12-23, at 706 (1978). See *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973); *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 95-96 (1947). See also *Greer* v. *Spock*, 424 U.S. 828

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[15] Another aspect of the question whether protected speech is implicated here at all concerns whether the appropriation of public funds involves protected speech. We know that the act of making political contributions and expenditures involves protected speech and not merely conduct. *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). The means by which a donor acquires funds which are given to finance political expression is one step further removed from the expression itself and was not considered in *Buckley* v. *Valeo*. Surely, the First Amendment does not justify the stealing of funds or of a printing press because the defendant was planning to use the funds or the printing press to publish his views on a subject of public concern. Governmental restraint, even prior restraint, plainly is appropriate in such a case, and the justification for that restraint may be that the wrongful act is not protected expression as much as the justification for the restraint that may be a compelling State interest in recovering the stolen property.

(1976). So, too, here First Amendment rights must be assessed in the context in which the governmental restriction arises.

The Commonwealth has a substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process. It may protect that interest by excluding its political subdivisions from partisan involvement in election questions, where the means employed are "'closely drawn to avoid unnecessary abridgement . . . [of First Amendment freedoms].'" *First Nat'l Bank* v. *Bellotti*, *supra* at [98 S. Ct. at 1421], quoting from *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976).

The Commonwealth's strong interest in free and fair elections is expressed in the Constitution of the Commonwealth. Article 9 of the Declaration of Rights provides that "[a]ll elections ought to be free." We have already noted that the Home Rule Amendment disclaims any grant to municipalities to regulate elections. Article 48, General Provisions, IV, as appearing in art. 74, § 4, concerning referenda, sets forth a procedure by which the Secretary of the Commonwealth (Secretary) must send every registered voter "the full text of every [referendum] measure to be submitted to the people, together with a copy of the legislative committee's majority and minority reports, if there be such, . . . a statement of the votes of the general court on the measure, and a fair, concise summary of the measure as such summary will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measure." This constitutional provision assures disclosure to every voter of the nature of each referendum before the date of the election and places in the Legislature the determination of what "other information and arguments for and against" may be distributed.

To implement the constitutional mandate, the Legislature made a determination of what other information and argu-

ments should be distributed. It has enacted provisions concerning the dissemination of information to the people on any question which will appear on the Statewide ballot. G.L. c. 54, §§ 53, 54, as appearing in St. 1977, c. 898. The Secretary must distribute to each residential address and to each voter residing in group residential quarters, copies of each referendum measure, "summaries prepared by the attorney general, a one-sentence statement describing the effect of a yes or no vote prepared by the state secretary, and, as provided in section fifty-four, arguments for and against measures to be submitted under [art. 48] of the Amendments to the Constitution." Section 54 requires each argument to be limited to 150 words. Pursuant to that section, the Secretary must seek arguments from the principal proponents and opponents of each referendum petition.

The people have expressed a strong interest that the Legislature have the authority to determine what, if any, material will be disseminated on a referendum proposal. The Legislature may decide, as it has, that fairness in the election process is best achieved by a direction that political subdivisions of the State maintain a "hands off" policy. It may further decide that the State government and its various subdivisions should not use public funds to instruct the people, the ultimate authority, how they should vote. That determination avoids the possibility of a babel of municipal huckstering and reserves the financing of public debate for nongovernmental agencies and individuals.[16] See *Buckley* v. *Valeo, supra* at 57.

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[16] Professor Emerson noted that one category of issues involving the protection which legal institutions must provide for a system of freedom of expression concerns the restriction of government. "The issues turn on the special character of government expression and the need for special protection to the system through rules such as requiring the government to make a balanced presentation of the issues." T.I. Emerson, The System of Freedom of Expression, at 19 (1970). In his chapter concerning Government Participation in

Fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose. The Commonwealth's interest in fairness and in the appearance of fairness is particularly significant in the face of the defendants' argument that no limit may be imposed on the city's expenditure of tax revenue for vigorous advocacy on a referendum question.[17] On this view, the Commonwealth is apparently powerless against political entities of its own creation.[18]

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the System of Freedom of Expression, he notes that "[n]o comprehensive effort to appraise the government role or to formulate principles of control has been undertaken." *Id.* at 698. He states that the government's right of expression should "not extend to any sphere that is outside the governmental function," and cites as an excluded area, "direct support of a particular candidate for office," noting that "[i]t is not the function of the government to get itself reelected." *Id.* at 699. Professor Emerson does not otherwise define the scope of "the governmental function." If we were to apply Professor Emerson's statement of limitations to the government's right of expression, we would express our conclusion in this case as follows: A political subdivision is acting outside its governmental function when it seeks to expend public funds to tell the people how to vote on constitutional referenda issues which would affect provisions for raising tax revenues.

[17] In numerous areas, the Legislature has imposed limitations on the expenditure of municipal funds, manifesting a legitimate concern for protecting the public purse. See, e.g., G.L. c. 40 § 5, (15), (27), (34), (37), (41), (42), (43), (46A), (47), (67), (71); § 5A; § 5B; § 6; § 6A. Some of these limitations relate to the gathering or dissemination of information. For example, G.L. c. 40, § 6A, regulates the amount which a municipality, which has accepted the section, may appropriate annually for the purpose of advertising its resources, advantages, and attractions.

[18] The defendants point out that possibilities of abuse of a municipality's alleged right of advocacy cannot abridge otherwise protected speech. The facts in the record do not demonstrate that the city will abuse its alleged right of advocacy, such as by issuing deceptive, vindictive, or coercive publications, nor does the record show that the city's publications would be monopolistic, or even domineering, or that they are calculated to perpetuate any official in office. In their brief, the defendants concede that, unlike private corporations (see *First Nat'l Bank* v. *Bellotti*, U.S. , [1978] [98 S. Ct. 1407, 1420 (1978)]), "the danger that public debate will be over-

Assuming that the Commonwealth has no right to restrict such advocacy where there is no opposition from any affected citizen, the Commonwealth has a compelling interest in restricting such advocacy where the affected citizenry are not in unanimity. The Commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree. Unlike the shareholders of a private corporation (see *First Nat'l Bank* v. *Bellotti*, U.S. [1978]) [98 S. Ct. 1407 (1978)], real estate taxpayers such as the plaintiffs cannot avoid the financial consequences of the city's appropriation of funds. The additional revenues that must be raised to finance the appropriations made in May of this year will be reflected in the taxes which will be assessed, as of January 1, 1978, on the plaintiffs' property for the fiscal year commencing July 1, 1978. G.L. c. 59, §§ 21, 57. The coercion which a majority of the Supreme Court found absent in *First Nat'l Bank* v. *Bellotti*, *supra* at note 34 [98 S. Ct. at 1425 n.34], is thus present here. And the objectors are not hypothetical. They have identified themselves by bringing this action.[19] This case is more analogous to *Abood* v. *Detroit*

whelmed by the speech of public entities may well warrant a prophylactic rule restricting speech by government bodies to matters closely related to their official responsibilities."

[19] In *First Nat'l Bank* v. *Bellotti*, *supra* at (98 S. Ct. at 1426), the Court noted that minority shareholders of a private corporation were not defenseless against the use of corporate funds for political expression. One remedy included "access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes." The implication of this statement is that a corporate charter or by-law forbidding the use of corporate funds for political purposes would be enforceable by the State, even when the management of the corporation wanted to speak out on a subject of public interest. The plaintiffs' action against a municipal corporation procedurally parallels a shareholder's derivative suit against a private corporation. This action is thus an aspect of

Bd. of Educ., 431 U.S. 209, 235-236 (1977), where the Supreme Court struck down involuntary contributions by government employees to a union's political expression.[20]

3. We come finally to the relief to which the plaintiffs are entitled. They seek an injunction against the city and its employees from taking certain action for the purpose or effect of influencing the outcome of the vote on the classification amendment. They ask that the city be enjoined from "(a) authorizing, disbursing, appropriating or spending any funds of the City of Boston therefor; (b) allowing, directing, encouraging, requesting or permitting any employee of the City

corporate democracy whose validity the Supreme Court seemingly acknowledged in *First Nat'l Bank* v. *Bellotti*.

As Professor Tribe points out in discussing the appropriate method of handling a union's participation in communications with which an employee compelled to contribute disagrees, "A better solution might well be to require ideological activities unrelated to collective bargaining to be financed from voluntary contributions in the first place." L.H. Tribe, American Constitutional Law § 12-4 at 589 n.5 (1978). Further, he disregards any attempt to distinguish the union cases from situations in which a taxpayer is compelled to contribute to a State's message with which the taxpayer disagrees. In a statement seemingly prophetic of the result we reach, he says, "Any notion that the very relation of taxpayer to government makes the refund argument inherently inapt seems refuted by positing a hypothetical instance in which, say, half the state budget of New Hampshire goes toward broadcasting 'Live Free or Die' across the countryside. [See *Wooley* v. *Maynard*, 430 U.S. 705 (1977)]. In such a case, even assuming that this allocation of public resources does not itself violate the first and fourteenth amendments, the Supreme Court should probably conclude that the broadcast cannot constitutionally be financed with the involuntary contributions of persons who disagree with the message." *Id.* at 590-591 n.8.

[20] If the proper remedy in union cases is that the dissenting member should not be obligated to pay that portion of his dues attributable to political activities (see *First Nat'l Bank* v. *Bellotti*, *supra* at n.34 [98 S. Ct. at 1425 n.34]), the remedy here is that any dissenting taxpayer should not be obliged to pay that portion of his local real estate taxes attributable to the city's political activities on the referendum proposal. Such a result, however, can be achieved more effectively by striking the entire appropriation and letting those who wish to do so make their own contributions directly to the cause.

of Boston, during normal working hours and while on the municipal payroll, directly or indirectly, to devote any time or service therefor, (c) allowing, directing, encouraging, requesting or permitting any person to use any building, office, telephone, stationery, automobile or other resource in the possession, ownership, custody or control of the City of Boston therefor."

A. The order which was entered on July 19, 1978 (see n.5 above), dealt with the expenditure of funds. Such an order is appropriate in an action brought under G. L. c. 40, § 53, where a municipality is about to raise or expend money for purposes not authorized by law. *Dealtry* v. *Selectmen of Watertown*, 279 Mass. 22, 27 (1932). That order enjoins the city from using any funds specifically apropriated to be used to influence the vote on the classification amendment. Of course, the city has no authority to use any other appropriated funds, including the services of any employees paid from funds appropriated for other purposes, for the purpose of influencing that vote. In our discretion, however, we decline to issue an order concerning municipal funds of any greater breadth then that already entered. We anticipate that the city will adhere to the requirements of law which are stated in this opinion. See *Bennett* v. *Assessors of Whitman*, 354 Mass. 239, 241-242 (1968).

No claim has been made concerning the recovery of funds already expended. Normally, G. L. c. 40, § 53, "does not authorize the undoing of completed transactions." *Spear* v. *Boston*, 345 Mass. 744, 746 (1963). In any event, neither the Massachusetts Mayors' Association, which received $112,550 from the city, nor Lee-Grigsby Associates, which received a $10,000 payment on its contract, is a party to this proceeding. We decline to express any view concerning whatever obligation there may be to restore, or to seek to recover, these

amounts which were paid not only after this action was commenced but also after the defendants had knowledge of the action.

B. In the absence of specific evidence of action by a municipal employee during his or her working hours in support of the classification amendment, we decline to issue an injunction or to make any specific declaration concerning the lawful limits of such conduct. At oral argument, the plaintiffs conceded that the mayor and persons in relevant policy-making positions in city government are free to act and to speak out in support of the classification amendment. Individual city employees may have certain rights of speech, even during working hours, concerning the classification amendment, and it is preferable that they be heard before any injunction which may affect those rights as issued.

In our July 19, 1978, order we observed that the injunctions against the use of specifically appropriated funds should not be construed "as implied authority for the city to use municipal employees or to use other appropriated funds for the purpose of supporting the proposed classification amendment." We cannot determine on this record what employees of the city may or may not speak out on the classification amendment during working hours. We did declare in our order that "[n]o municipal officer or employee may be required or compelled to devote time during his or her working hours to solicit public support for the proposed classification amendment."[21] This much clearly follows from the general conclusion that city funds may not be used to advocate an affirmative response on the classification amendment. Any further order from this

[21] This restraint, of course, prohibits the imposition of any sanction on any employee for his or her failure to "volunteer" to participate in action in support of the classification amendment.

court on this question on the conduct of city employees is not possible on this record.

C. Our order made no explicit reference to the use of city facilities, equipment, and supplies to advocate adoption of the classification amendment. The city intends to use office space and telephones for this purpose and to make them available to volunteers. It also intends to provide printed materials for distribution to the voters. From what we have said, it is apparent that the city's use of telephones and printed materials provided by public funds, and its use of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972); *Bonner-Lyons* v. *School Comm. of Boston*, 480 F.2d 442, 444 (1st Cir. 1973). Here, however, the record shows no specific examples of the use of the city's facilities, equipment, and supplies. In light of what we have said on this subject, we expect that the city will recognize the limitations on its authority and will conform to them.

Because all relief to which the plaintiffs are entitled can be granted in a ten-taxpayers' action under G. L. c. 40, § 53, we need not consider the question whether the plaintiffs have standing to seek relief separately or additionally in a declaratory judgment proceeding (G. L. c. 231A).

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPREME JUDICIAL COURT.
FOR SUFFOLK COUNTY
No. 78-253 CIVIL

RICHARD L. ANDERSON, ET AL.

v.

CITY OF BOSTON, ET AL.

Judgment.

This action came on for hearing before the Court, and the issues having been duly heard,

It is Ordered and Adjudged that:

1. The City of Boston, its agents and employees, are enjoined from expending the funds appropriated by the city council on June 7, 1978 to meet the current expenses of the Office of Public Information on Classification;

2. The City of Boston, its agents and employees, are enjoined from making payments to Lee-Grigsby Associates or to Butcher-Forde Consulting pursuant to contracts between those entities and the City of Boston, which contracts were executed and filed with the City Auditor on June 28, 1978;

3. The City of Boston, its agents and employees, are enjoined from requiring or compelling any municipal officer or employee to devote time during his or her regular working hours to solicit public support for the proposed classification amendment.

Dated at Boston this fourth day of October, 1978.

By the Court,

JEAN M. KENNETT,
Assistant Clerk.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss. SUPREME JUDICIAL COURT
No. 78-253

RICHARD L. ANDERSON, ET AL,
PLAINTIFFS
v.
CITY OF BOSTON, ET AL,
DEFENDANTS

Agreed Statement of Facts.

The parties hereto agree and stipulate the truth and authenticity of the following facts and documents for the purposes of the trial of this action in the Supreme Judicial Court and for no other purpose:

1. The plaintiffs are taxable inhabitants of the City of Boston.

2. The City of Boston is a municipal corporation duly organized and existing under the laws of the Commonwealth of Massachusetts.

3. Kevin H. White is the duly elected Mayor of the City of Boston.

4. Lawrence DiCara, Patrick McDonough, Rosemarie Sansone, Joseph Tierney, Frederick Langone, Raymond Flynn, Albert O'Neal, Christopher Ianella, and James Michael Connolly are all the duly elected members of the Boston City Council.

5. James V. Young is the Collector-Treasurer of the City of Boston with the additional title of Deputy Mayor for Fiscal Affairs.

6. James Hyde is the First Assistant Collector-Treasurer of the City of Boston.

7. John Weis is employed by the City of Boston as the Director of the Office of Public Information on Classification.

8. The following proposed amendment to the Massachusetts Constitution (hereinafter "Classification Referendum question"), having been approved in joint constitutional session of two successive General Courts will be presented to the people of Massachusetts for approval in the general election to be held in November, 1978:

ARTICLE OF AMENDMENT

> Article IV of chapter 1 of Part the Second of the Constitution is hereby amended by inserting after the words "and to impose and levy proportional and reasonable assessments rates and taxes, upon all the inhabitants of and persons resident, and estates lying, within said Commonwealth," the words: — except that, in addition to the powers conferred under Articles XLI and XCIX of the Amendments, the general court may classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established, but proportionately in the same class, and except that reasonable exemptions may be granted.

9. Mayor White and a majority of the City Council support the passage of the Classification Referendum question.

10. On May 30, 1978 Mayor White submitted to the City Council a proposed ordinance and on June 7, 1978, the City Council passed an ordinance authorizing the expenditure of public funds for the purpose of urging the passage of the Classi-

fication Referendum question. The ordinance contains certain limitations on the use of the funds. On June 23, 1978, the mayor approved the ordinance. A copy of the ordinance is attached hereto and marked "A".

11. On May 31, 1978 Mayor White submitted an appropriation order to the City Council requesting that $1,837,483 be appropriated for the purpose of funding an "Office of Public Information on Classification." On June 7, 1978, the City Council passed an appropriation order in the form attached hereto and marked "B". The order contains certain limits on the use of the funds, including the requirement of a further majority vote of the City Council for the expenditure of almost one-half of the amount appropriated. By the terms of the appropriation, the funds are to be raised by taxation pursuant to G. L. c. 59, § 23. On July 1, 1978, $500,000 of the appropriation became available for use. The remaining $475,000 was placed in a reserve fund for future expenditures. The appropriation order was approved by Mayor White on June 23, 1978.

12. Mayor White has organized an agency within the city government called the Office of Public Information on Classification for the purpose of collecting and disseminating information about the impact of 100% valuation on the residents of the City and on the potential of the classification amendment to mitigate that impact. The Office will include in its information the fact that the City government urges the voters to approve the Classification Referendum question.

13. The Office of Public Information on Classification is encouraging the establishment of a group of citizen volunteers to assist in the collection and dissemination of information on classification to the public. The City will provide office space and telephones to the volunteers to enable them to augment the City's efforts and will also provide printed materials which have been prepared at City expense for distribution to the

voters. The volunteers will receive no monetary compensation, nor will they be provided with City funds for their activities.

14. Mayor White appointed the defendant John Weis, a member of his staff, to direct the operation of the Office of Public Information on Classification. Other City employees have volunteered to serve full time on the staff of the office as part of their official duties. Additionally other City employees have volunteered to spend part of their time during regular City business hours assisting with the operations of the Office. City department heads were initially requested by the Mayor to spend three hours per day between 9 a.m. and 5 p.m. in this effort in addition to their regular duties. The Mayor reduced this request to one hour daily once the initial organizational activities had been completed. These department heads continue to receive their full City salaries.

15. Studies conducted by the City indicate that the implementation of 100% valuation in the City will effect a transfer of tax burden from commercial and industrial property to residential property in a gross amount of approximately $78 million. This transfer will practically double the tax burden on many single family homes in the City, increasing the tax on them by over $1,000.

16. The Office of Public Information on Classification has made efforts to learn of the level of voter understanding of the classification issue. The Office's studies indicated that while many Boston voters understand the impact of 100% valuation on their taxes, few were acquainted with the Classification Amendment or had any idea of its possible impact in mitigating the effects of 100% valuation.

17. The City of Boston derives 54% of its annual budget from the real property tax.

18. Of the City's fiscal year 1979 budget to be raised by property taxation, 24.5% or $172,600,000 are fixed costs

which cannot by law be reduced, because of vested pension rights, debt service, or other nondiscretionary obligations controlled by statute, not including personnel.

19. There are persons and interests opposed to the passage of the Classification Amendment who will work for its defeat and who are raising funds from individuals and corporations for this purpose.

20. On June 14, 1978, a Massachusetts Mayors' Association subcommittee which has been directed to organize the Association's efforts in support of the Classification Amendment voted to assess each City in the Commonwealth on a per capita basis so as to raise a total of $500,000 for a statewide information campaign on the Amendment. A copy of the schedule of assessment, with a covering letter, was sent on June 28, 1978. The schedule and the letter are attached hereto as "C". The assessment of $112,550 was paid by the City on June 30, 1978.

21. On June 28, 1978 the City completed the execution of and filed with the City Auditor two contracts, one with Lee-Grigsby Associates in the amount of $123,000 and one with Butcher-Ford Consulting, in the amount of $100,000. The contract with Lee-Grigsby calls upon them to instruct volunteers in the effective communication of information to voters about the Classification Amendment. A payment of $10,000 was made to Lee-Grigsby on June 29, 1978 for work already performed. The contract with Butcher-Forde Consulting calls upon the firm to conduct a study on the level of public understanding on the classification issue and to design informational materials and a strategy for their distribution in accord with the findings of this study. No payments have been made pursuant to this contract.

22. Funds to meet the obligations described in Paragraphs 20 and 21 were transferred from the Public Facilities Department to the Administrative Services Department by the City

Auditor on June 28 and 29, 1978 with the approval of the Mayor under section 3B of the City Charter (St. 1909 c. 486).

23. There were no appropriations in the fiscal 1978 budget expressly designated by the City Council for expenditures on behalf of the Classification Referendum question.

For the Plaintiffs,

HAROLD HESTNES
JOHN G. FABIANO
KENNETH R. BERMAN
Hale and Dorr
60 State Street
Boston, MA 02109
(617) 742-9100

For the Defendants,

HAROLD J. CARROLL
Assistant Corporation Counsel
City of Boston
City Hall, Room 615
Boston, MA 02201
(617) 725-4026

LAURENCE H. TRIBE
Professor of Law
Harvard Law School
Cambridge, MA 02138
(617) 495-4621

ATTACHMENT A.

CITY OF BOSTON

IN THE YEAR NINETEEN HUNDRED AND SEVENTY-EIGHT

AN ORDINANCE

AUTHORIZING THE EXPENDITURE OF FUNDS TO INFORM THE VOTERS ON THE PROPOSED CONSTITUTIONAL AMENDMENT RELATING TO THE CLASSIFICATION OF PROPERTY FOR TAX PURPOSES

Be it ordained by the City Council of Boston, as follows:

SECTION 1. The City may, subject to appropriation, expend monies for the purposes of providing educational materials and disseminating information urging the adoption by the people of a proposed amendment to the Massachusetts Constitution relating to the classification of property for purposes of taxation.

SECTION 2. It is specifically forbidden to use any monies expended for the promotion of any individual and no public official may have his name, picture or the like individually displayed on any so-called educational material.

SECTION 2A. All printing shall be contracted with the City of Boston Printing Department and performed by the City of Boston Printing Department.

SECTION 3. This ordinance shall expire on December 1, 1978.

SECTION 4. Notwithstanding the provisions of CBC Ord. 2, § 752, this ordinance shall be published by the action of the City Council in passing the same.

SECTION 5. Whoever violates any provision of this ordinance shall be personally liable for any funds encumbered or expended by said City of Boston on the promotion of said Constitutional Amendment.

In City Council June 7, 1978. Passed — yeas five, nays four.

Approved by the Mayor June 23, 1978.

Attest:

J. P. O'DONNELL,
City Clerk.

ATTACHMENT B.

CITY OF BOSTON

IN CITY COUNCIL

ORDERED: That to meet the current expenses of the Office of Public Information on Classification in the fiscal period commencing July 1, 1978 and ending June 30, 1979, the sum of Nine Hundred Seventy-Five Thousand Dollars ($975,000) be, and the same hereby is appropriated, said sum to be raised by taxation pursuant to Section 23 of Chapter 59 of the General Laws:—

1-01-33	Office of Public Information on Classification	
1.	Personal Services	$ 36,983
2.	Contractual Services	863,017
3.	Supplies and Materials	50,000
4.	Current Charges and Obligations	25,000

and be it further

ORDERED: That Five Hundred Thousand Dollars ($500,000) be appropriated immediately for the department and that the remainder of this sum, namely Four Hundred Seventy-Five Thousand Dollars ($475,000) be placed in the Reserve Fund for future expenditures.

FURTHER ORDERED: That should a permanent injunction be granted to any parties contesting the legality of this appropriation, then any funds not encumbered or spent shall be returned immediately to the City Treasury.

FURTHER ORDERED: Expenditures of any and all funds appropriated shall be monitored by Mass. Fair Share, Common Cause, Mass. Taxpayers Foundation.

In City Council June 7, 1978. Passed — yeas five, nays four.

Approved by the Mayor June 23, 1978.

Attest:

J. P. O'DONNELL,
City Clerk.

The foregoing order was originated by the Mayor and was submitted to the City Council on May 31, 1978.

Attest:

J. P. O'DONNELL,
City Clerk.

———

ATTACHMENT C.

MASSACHUSETTS MAYORS' ASSOCIATION

6 BEACON STREET • BOSTON • MASSACHUSETTS 02108
617-742-2334

June 28, 1978

The Honorable Kevin H. White
Boston City Hall
Boston, Massachusetts 02201

Dear Mayor White:

As part of the Mayors' Association effort to inform voters in the Commonwealth on the effects of 100% revaluation, the proposed Classification Amendment to the Constitution and the effects of a proposed limit on state and local taxes, we have formed a statewide subcommittee on classification to oversee these efforts. At our meeting in Lynn on June 14, 1978, members of this subcommittee voted to assess cities and towns, on a prorated, population-formula basis, to help pay the costs of this effort.

It was our decision at that time to initially raise a total of $506,805 from our members. The City of Boston was assessed $112,550 for the initial phase. This letter is to officially inform you of this assessment. Please direct payment to Mass Mayor's Association, Inc., 6 Beacon Street, Boston, Massachusetts 02108.

Thank you for your attention to this matter.

Sincerely,

ANTONIO MARINO,
First Vice President,
Massachusetts Mayors' Association.

City	1975 Population	Public Fund Contribution Based on $.1767 Per Capita Charge	Private Fund Contribution Based on $.01767 Per Capita Charge
1. Attelboro	32,650	$ 5,770.00	$ 577.00
2. Beverly	37,316	6,595.00	659.50
3. Boston	636,969	112,550.00	11,255.00
4. Brockton	95,688	16,910.00	1,691.00
5. Cambridge	101,930	18,010.00	1,801.00
6. Chelsea	25,015	4,420.00	442.00
7. Chicopee	58,431	10,325.00	1,032.50
8. Everett	39,267	7,000.00	700.00
9. Fall River	100,339	17,730.00	1,773.00
10. Fitchburg	39,070	6,905.00	690.50
11. Gardner	19,349	3,420.00	342.00
12. Gloucester	27,124	4,795.00	479.50
13. Haverhill	44,135	7,800.00	780.00
14. Holyoke	46,790	8,270.00	827.00
15. Lawrence	67,360	11,905.00	1,190.50
16. Leominster	35,429	6,260.00	626.00
17. Lowell	90,286	15,955.00	1,595.50
18. Lynn	80,240	14,180.00	1,418.00
19. Malden	55,755	9,850.00	985.00
20. Marlborough	30,240	5,345.00	534.50
21. Medford	60,702	10,725.00	1,072.50
22. Melrose	32,058	5,665.00	566.50
23. New Bedford	100,345	17,730.00	1,773.00
24. Newburyport	16,297	2,880.00	288.00
25. Newton	88,731	15,680.00	1,568.00
26. North Adams	18,424	3,255.00	325.50
27. Northampton	27,695	4,895.00	489.50
28. Peabody	45,503	8,040.00	804.00
29. Pittsfield	55,299	9,770.00	977.00
30. Quincy	91,270	16,125.00	1,612.50
31. Revere	41,292	7,295.00	729.50
32. Salem	38.441	6,780.00	678.00
33. Somerville	80,446	14,215.00	1,421.50
34. Springfield	168,785	29,825.00	2,982.50
35. Taunton	42,148	7,450.00	745.00
36. Waltham	56,590	10,000.00	1,000.00
37. Westfied	32,863	5,805.00	580.50
38. Woburn	35,191	6,220.00	622.00
39. Worcester	172,342	30,455.00	3,045.50
TOTAL 39 CITIES	2,868,165	$506,805.00	$50,680.50

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

At Boston, July 19, 1978

RICHARD L. ANDERSON and others

v.

CITY OF BOSTON and others

SJC-1513

Supreme Judicial Court for Suffolk County No. 78-253

Order.

The City of Boston, its agents and employees, are enjoined from expending the funds appropriated by the city council on June 7, 1978, to meet the current expenses of the Office of Public Information on Classification and are further enjoined from making payments to Lee-Grigsby Associates or to Butcher-Forde Consulting pursuant to the contracts between those entities and the City of Boston, which contracts were executed and filed with the City Auditor on June 28, 1978. This order should not be construed as implied authority for the city to use municipal employees or to use other appropriated funds for the purpose of supporting the proposed classification amendment. No municipal officer or employee may be required or compelled to devote time during his or her regular working hours to solicit public support for the proposed classification amendment.

Rescript and opinion to follow.

By the Court,

FREDERICK J. QUINLAN,
Clerk.

July 19, 1978

Appendix E.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
SJC-1513

RICHARD C. ANDERSON, ET AL.
PLAINTIFFS

v.

CITY OF BOSTON, ET AL.
DEFENDANTS

Motion for Stay of Judgment.

Now come the defendants in the above action and move that the Order entered by the Court on July 19, 1978, be stayed pending action by the United States Supreme Court on defendants' appeal and defendants' petition for a writ of certiorari.

Defendants have asserted rights under the First and Fourteenth Amendments to conduct the activities proscribed by the Court's Order. The content of the speech suppressed by the Court's Order is inextricably bound to the timing of such speech. If the defendants' First Amendment rights are recognized only after hearing before the United States Supreme Court, the election concerning the Classification Amendment will have passed, and the defendants will have forever lost the ability to speak out on the issue posed by that Amendment.

The plain and substantial irreparable harm inevitably suffered by the defendants in the absence of a stay outweighs

whatever harm might befall plaintiffs in the event that money spent by defendants might not be recovered. In any balance, free communication must surely overcome money.

Wherefore, the defendants respectfully move that the Order of July 19, 1978 be stayed.

By their Attorneys,

HERBERT P. GLEASON
Corporation Counsel
HAROLD J. CARROLL
Assistant Corporation Counsel
City of Boston Law Dept.
Room 615, City Hall
Boston, Mass. 02201
725-4026

LAURENCE H. TRIBE
Professor of Law
Harvard Law School
Cambridge, Mass. 02138
495-4621

Appendix F.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
SJC-1513

RICHARD C. ANDERSON, ET AL.
PLAINTIFFS
v.
CITY OF BOSTON, ET AL.
DEFENDANTS

Defendants' Motion for a Rehearing.

Now come the Defendants in the above action and move that the Court grant a rehearing on the merits of the case. On July 22, 1978 the Governor approved Chapter 572 of the Acts of 1978, which regulates the expenditure of public funds to influence a referendum.

That Act substantially alters the legislative background of the challenged expenditures in this case. Since the Act was approved after the Court's Order in the case, Defendants respectfully suggest that a rehearing is appropriate.

By their Attorneys,

HERBERT P. GLEASON
Corporation Counsel
HAROLD J. CARROLL
Assistant Corporation Counsel
City of Boston Law Dept.
Room 615, City Hall
Boston, Mass. 02201

LAURENCE H. TRIBE
Professor of Law
Harvard Law School
Cambridge, Mass. 02138
495-4621

CERTIFICATE OF SERVICE.

I certify that I serve the Defendants' Motion for a Stay of Judgment and for a Rehearing, and Defendants' Memorandum in Support of the Motion for a Rehearing on the Plaintiffs by hand delivering copies of the same to the following:

Harold Hestnes, Esquire
Hale & Dorr
60 State Street
Boston, Massachusetts

HAROLD J. CARROLL
Assistant Corporation Counsel
City of Boston Law Dept.
Room 615, City Hall
Boston, Mass. 02201
725-4026

Dated: July 28, 1978

Appendix G.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

COURT HOUSE

BOSTON

FREDERICK J. QUINLAN
Clerk
WILLIAM M. CLORAN
Assistant Clerk

August 23, 1978.

Harold J. Carroll, Asst. Corporation Counsel
Laurence H. Tribe, Spec. Counsel for City of Boston
City of Boston Law Department
City Hall
Boston, Massachusetts 02201

Re: *Anderson et al* v. *City of Boston et al*
Supreme Judicial Court No. SJC-1513

Gentlemen:

The Motion for Stay of Judgment, Motion for Reconsideration, and the Opposition to the Motion for Stay of Judgment have been considered by the court and are denied.

Very truly yours,

WILLIAM M. CLORAN,
Asst. Clerk.

cc.: Harold Hestnes, Esq.
John G. Fabiano, Esq.
Hale and Dorr
28 State Street, Boston 02108

Appendix H.

IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

City of Boston, Kevin H. White, Patrick J. McDonough, Frederick C. Langone, Albert O'Neil, Christopher A. Iannella, James Michael Connolly, James V. Young, Michael Hyde, and John Weis, APPELLANTS,

v. No. 78-253

Richard L. Anderson, George M. Burke, Donald G. Colony, Robert L. Hughes, Jr., Andrew A. Hunter, Arnold London, Frank Remick, Edward N. Wadsworth, Richard Wait, Thomas R. B. Wardell, and William M. Yates, APPELLEES.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of Boston and the other appellants named above hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts enjoining appellants from making certain expenditures and undertaking certain other activities for the purpose of urging the people to adopt a proposed amendment to the state constitution, entered in this action on October 4, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

LAURENCE H. TRIBE,
Counsel for Appellants.

CERTIFICATE OF SERVICE.

I, Laurence H. Tribe, attorney for the Appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance by delivering same to the Clerk of the Supreme Judicial Court for the Commonwealth of Massachusetts and the Clerk of the Supreme Judicial Court for Suffolk County, Court House, Pemberton Square, Boston, Massachusetts 02108, and to Harold Hestnes and John G. Fabiano, Hale and Dorr, 60 State Street, Boston, Massachusetts 02109, attorneys for the Appellees. All parties required to be served have been served.

LAURENCE H. TRIBE,

Dated: October 16, 1978

Appendix I.

CHAPTER 55

Disclosure and Regulation of Campaign Expenditures and Contributions

[ACCOUNTING FOR CONTRIBUTIONS AND EXPENSES]

SEC.

1. Definitions. Application to fund-raising activities.
2. Accounts of contributions. Information required. Penalties.
3. Director of campaign and political finance. Investigations and witnesses. Referral of alleged violations. Limitation of actions.

[POLITICAL COMMITTEES]

4. Committees operating on behalf of presidential and vice-presidential candidates. Approval by candidate. Candidates for United States senate or house of representatives.
5. Statement of organization of political committee. Treasurer. Separate accounts. Penalties.
6. Receipt, expenditure, and investment of money, etc. Contributions to other political committees. Penalties.

[POLITICAL CONTRIBUTIONS]

7. Authorized purposes for receipts and expenditures. Limitation on individual contributions. Form for payment for goods or services. Penalties.
8. Certain corporations prohibited from making contributions. Exception. Penalties.
9. Payment by check of contributions or expenditures exceeding a certain dollar amount. Penalties.
10. Disclosure of contributor's identity. Penalty.
11. Soliciting payment, etc., from candidates or elected officials prohibited. Exceptions. Penalties.
12. Soliciting payment from candidates for delivery of nomination papers. Penalties.
13. Public officers and employees prohibited from soliciting contributions. Exceptions. Penalty.
14. Solicitation of contributions in public building prohibited. Penalties.

15. Public officers and employees prohibited from making contributions. Penalty.
16. Public officers and employees not required to contribute or render political service. Penalty.
17. Coercion of public officers or employees prohibited. Penalty.

[STATEMENTS OF CONTRIBUTIONS AND EXPENDITURES]

18. Filing of reports of contributions and expenditures. Reporting periods. Information required. Penalties.
19. Depository of campaign funds. Restrictions on deposits and expenditures. Filing bank statement and summary of contributions with director. Penalties.
20. Campaign media expenses. Limitations. Reports. Penalties.
21. Campaign media expenses. Reports by persons, etc., receiving payment.
22. Statement of corporate contribution. Penalties.
23. Accounting to treasurer for funds received or expended. Penalties.
24. Filing statements with appropriate officers. Form of indorsement.
25. Retention of reports and statements by director. Public inspection and copying.
26. Retention of reports and statements by city or town clerk. Public inspection and copying.
27. Furnishing forms to officials and candidates. Furnishing summaries of laws.
28. Inspection of statements and reports. Correcting deficiencies.
29. Procedure upon failure to file report or upon discovery of violation.
30. Judicial enforcement of filing requirements. Procedure.
31. Immunity for witnesses.

[CORRUPT PRACTICES]

32. Corrupt practices.
33. Election petitions. Procedure. Defenses. Initiating criminal action.
34. Applicability of GL c. 55, §§ 1–33. What constitutes a political committee.

[ELECTION INQUESTS]

35. Inquest by district court upon complaint of violation of laws relating to voters, ballots, etc.

36. Inquest. Exclusion of public. Separation and examination of witnesses.
37. Inquest. Subpoenas of witnesses.
38. Inquest. Stenographer. Reporting violations to superior court.
39. Inquest. Binding witnesses over for superior court action.
40. Inquest. Issuance of process for apprehension of violators.
41. Inquest. Witnesses' immunity from prosecution.

[PENALTIES FOR CORRUPT PRACTICES]

42. Removal from roll of registered voters upon criminal conviction or adverse civil judgment.

[ACCOUNTING FOR CONTRIBUTIONS AND EXPENSES]

§ 1. Definitions; Application to Fund-Raising Activities.

For the purpose of this chapter, unless a different meaning clearly appears from the context, the following words shall have the following meanings:

"Candidate", any individual who seeks nomination or election to public office, whether or not such individual is nominated or elected. For the purpose of this chapter, an individual shall be deemed to be seeking nomination or election to such office if he has (1) received a contribution or made an expenditure, or has given his consent for any other person or committee to receive a contribution or make an expenditure, for the purpose of influencing his nomination or election to such office, whether or not the specific public office for which he will seek nomination or election is known at the time the contribution is received or the expenditure is made, or (2) taken the action necessary under the laws of the commonwealth to qualify himself for nomination or election to such office, or, if said individual holds elective public office, whether elected or appointed to such office, and he has (3) received any money or anything of value, or made any disbursement resulting from any purchases, made from said individual, or a committee, or a person acting on behalf of said individual or committee, whether through the device of tickets, advertisements, or otherwise, for any fund-raising activity, including a testimonial, regardless of the purpose of said activity, held on behalf of said individual at any time while he holds said public office.

"Contribution", a contribution of money or anything of value to an individual, candidate, political committee, or person acting on behalf of said individual, candidate or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include any: (1) gift, subscription, loan, advance, deposit of money, or thing of value, except a loan of money to a candidate by a national or state bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business; (2) transfer of money or anything of value between political committees; (3) payment, by any person other than a candidate or political committee, or compensation for the personal services of another person which are rendered to such candidate or committee; (4) purchase from an individual, candidate, or political committee, or person acting on behalf of said

individual, candidate, or political committee, whether through the device of tickets, advertisements, or otherwise, for fund-raising activities, including testimonials, held on behalf of said individual, candidate or political committee, to the extent that the purchase price exceeds the actual cost of the goods sold or services rendered; (5) discount or rebate not available to other candidates for the same office and to the general public; and (6) forgiveness of indebtedness or payment of indebtedness by another person; but shall not include the rendering of services by speakers, editors, writers, poll watchers, poll checkers or others, nor the payment by those rendering such services of such personal expenses as may be incidental thereto, nor the exercise of ordinary hospitality.

"Director", the director of campaign and political finance.

"Election", any convention or caucus of a political party held to nominate a candidate, and any city, town or state preliminary, primary or election, and any special preliminary, primary or election.

"Expenditure", any expenditure of money, or anything of value, by an individual, candidate, or political committee, or a person acting on behalf of said individual, candidate, or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or of presidential and vice presidential electors, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters, and shall include: (1) any purchase, payment, distribution, loan, advance, deposit, or gift of money, or anything of value; and (2) any transfer of money or anything of value between political committees.

"Political committee", any committee, association, organization or other group of persons, including a national, regional, state, county, or municipal committee, which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate, or candidates, or of presidential and vice presidential electors, or for the purpose of opposing or promoting a charter change, referendum question, constitutional amendment, or other question submitted to the voters.

Notwithstanding any other provisions of this chapter, any receipt or disbursement of any money or anything of value by an individual, or person acting on behalf of said individual, which is not otherwise a "contribution" or "expenditure" as defined in this section, resulting

from any purchases from said individual, or any person acting on behalf of said individual, whether through the device of tickets, advertisements, or otherwise, for any fund-raising activity, including a testimonial, held on behalf of said individual, regardless of the purpose of said activity, shall be deemed to be a "contribution" or "expenditure" if said individual: (1) is a candidate in accordance with the provisions of clauses (1) and (2) of the definition of "Candidate" at the time of said receipt or disbursement; (2) holds elective public office, whether elected or appointed to such office, at the time of said receipt or disbursement, and thereby becomes a candidate in accordance with the provisions of clause (3) of said definition; or (3) becomes a candidate in accordance with said clauses (1) or (2) of said definition subsequent to such receipt or disbursement, and shall be reported as a contribution or an expenditure in accordance with the provisions of sections eighteen and nineteen. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 2. Accounts of Contributions; Information Required; Penalties.

Every candidate shall keep detailed accounts of all contributions received by him, or by a person acting on his behalf, and of all expenditures made by him, or by a person acting on his behalf. Said accounts may be kept by an agent duly authorized thereto, but the candidate shall be responsible for said accounts, which shall be kept separate and distinct from all other accounts and shall include contributions made by the candidate from his own personal funds or otherwise. Said accounts shall include:

(1) the full name and residential address of each person who has made a contribution, in an amount or value of fifteen dollars or more, or twenty-five dollars or more, if the candidate is required to designate a depository in accordance with the provisions of section nineteen, in a reporting period, and such information for each contribution of less than the sum of fifteen dollars, or twenty-five dollars, if the aggregate of all contributions received from such contributor within said reporting period is the sum of fifteen dollars or more, or twenty-five dollars or more, as the case may be, and the amount or value and date of the contribution; provided, however, that any contributions resulting from any purchases from a candidate or a person acting on his behalf, whether through the device of tickets, advertisements, or otherwise, for any fund-raising activities, including testimonials, held on behalf of said candidate, regardless of the purpose of said activity, shall not be included with the accounts of those contributions described herein, but shall be included with those accounts of contributions in clauses (2) and (4) of this section;

(2) for those contributions resulting from such purchases as are excluded from clause (1), the full name and residential address of each person who has made such purchases if the amount or value paid is fifteen dollars or more, or twenty-five dollars or more, if the candidate is required to designate a depository in accordance with the provisions of section nineteen, in a reporting period and such information for each amount or value paid for each purchase of less than

the sum of fifteen dollars, or twenty-five dollars, if the aggregate of all amounts or value paid for such purchases made by said person within said reporting period is the sum of fifteen dollars or more, or twenty-five dollars or more, as the case may be, and the amount or value paid and date of the purchase;

(3) the amount or value and date of each contribution made, in a reporting period, except for those contributions resulting from such purchases as are excluded from clause (1), which is not otherwise included under clause (1);

(4) for those contributions resulting from such purchases as are excluded from clause (1), which are not otherwise included under clause (2), the amount or value paid and date for all such purchases in a reporting period;

(5) the full name and address of each person to whom an expenditure is made in excess of twenty-five dollars in a reporting period, a receipted bill stating the particulars for each such expenditure, including the amount or value, date and purpose of each such expenditure; provided, however, that any expenditures resulting from such purchases as are excluded from clause (1) shall not be included with the accounts of those expenditures described herein;

(6) for those expenditures resulting from such purchases as are excluded from clause (5), the full name and address of each person to whom any expenditure is made, in a reporting period, in an amount or value in excess of twenty-five dollars, the amount or value, date and purpose of each such expenditure;

(7) the amount or value, date and purpose of each expenditure made, in a reporting period, which is not otherwise included under clause (5), except those expenditures resulting from such purchases as are excluded from clause (5);

(8) for those expenditures resulting from such purchases as are excluded under clause (5), the amount or value, date and purpose of each expenditure made in a reporting period, which is not otherwise included under clause (6).

The candidate shall preserve all receipted bills and accounts required to be kept by this section until the term of the office the candidate is seeking has ended.

Violation of any provision of this section shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 3. Director of Campaign and Political Finance; Investigations and Witnesses; Referral of Alleged Violations; Limitation of Actions.

The state chairman of each of the two leading political parties, the state secretary, and a dean of a law school located in the commonwealth, to be appointed by the governor as provided hereinafter, shall serve as a commission for the purposes of selecting the director of campaign and political finance. The term of the dean of a law school shall be six years but shall expire if he should cease to act as dean; a successor shall be appointed within thirty days after the occurrence of a vacancy in said office. The state secretary shall act as chairman of said commission.

Selection of the director, who shall be a resident of the commonwealth, shall be by unanimous vote of the members of the commission. The commission shall select a successor director no later than thirty days prior to the expiration date of the term of the director and no later than sixty days after the occurrence of a vacancy in said office; provided, however, in the event that a vacancy shall exist in the office of director for ten days beginning with the date of the primary election at which a candidate for any statewide office is nominated and ending one hundred and twenty days after the election, the chairman of the commission shall appoint a director pro tem, who shall serve until a successor director is appointed in accordance with the provisions hereof. An incumbent director may be selected for a succeeding term or terms.

The director shall serve for a term of six years and, unless removed, until his successor has been selected and has assumed the office. He may not be removed from office except upon an affirmative vote of all of the members of the commission then serving. Removal of the director shall be at the discretion of the commission, and shall not be reviewable.

The director shall devote full time to his duties during normal business hours and shall receive an annual salary of twenty-three thousand eight hundred and twenty-one dollars. He shall not, during the term he serves as director, engage in any political activities of any nature, nor shall he hold any other public office; provided, however, that he shall be free to advise and consult with legislative committees, the members of the general court and other persons affected by the laws under his jurisdiction, and to advocate and sponsor legislation.

The director shall appoint at least one full-time accountant, one full-time clerk, two full-time investigators, and one full-time secretary, with not less than one and not more than three additional part-time aides during election years. Said positions or any other positions appointed by the director shall not be subject to the provisions of chapter thirty-one.

The director shall make available to investigative, accounting and law enforcement agencies of the commonwealth all information necessary or advisable to fulfill their duties, with respect to this chapter. He shall, from time to time as he deems necessary or advisable, issue rules and regulations in conformity with the provisions of this chapter and chapter thirty A, and shall also issue interpretative bulletins and respond with reasonable promptness to requests for information, interpretations and advice presented by candidates, state committees, political committees and members of the public.

All acts, decisions and rulings of the director shall be subject to judicial review under the provisions of chapter thirty A upon the application of any interested person.

The director shall have the power and authority to investigate the legality, validity, completeness and accuracy of all reports and actions required to be filed and taken by candidates, treasurers, political committees, and any other person pursuant to this chapter and any other laws of the commonwealth pertaining to campaign contributions and expenditures. He may require, by summons, the attendance and testimony under oath of witnesses and the production before him of books and papers relating to any matter being investigated by him. Such summons shall be served in the same manner as summonses for witnesses in criminal cases issued on behalf of the commonwealth and all provisions of law relative to summonses issued in such cases shall apply to summonses issued under this section so far as applicable. Any justice of the supreme judicial court or of the superior court may upon application by the director compel the attendance of witnesses summoned as aforesaid and the giving of testimony under oath before said director in furtherance of any investigation in the same manner and to the same extent as before said courts.

The director shall establish rules and procedure governing the conduct of his hearings and investigations which shall be made available in printed form to each witness prior to his testimony. Witnesses shall have the right to be represented by counsel and shall before testifying be sworn. Witnesses shall testify only at private hearings and the same provisions with reference to secrecy which govern proceedings of a grand jury shall govern all proceedings before the director. Violations of such provisions with regard to secrecy shall be punished by a fine of up to one thousand dollars and imprisonment for not more than one year, or both. Upon conviction for any such violation said director shall be removed and the office of director deemed vacant.

The director shall inform any person or committee under investigation by said director by registered mail, return receipt requested, of his intention to present to the attorney general evidence of any alleged violation of this chapter. Within ten days of receipt of said notice said alleged violator may request a hearing before the director for the purpose of presenting evidence to the contrary. Said director shall not present evidence of any such alleged violation to the attorney general until after said hearing. Evidence of any such violation of this chapter which has come to his attention shall be presented by the director to the attorney general only after the relevant election involved, but within two years after said election. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1977, 234, §§ 126A–126C, approved, with emergency preamble, May 25, 1977; by § 198, effective July 1, 1976, Jan. 1, 1977 and April 1, 1977; by § 204, effective July 31, 1977; 1978, 204, approved June 1, 1978.)

§ 4 Committees Operating on Behalf of Presidential and Vice-Presidential Candidates; Approval by Candidate; Candidates for United States Senate or House of Representatives.

Political committees organized or operating principally within the commonwealth on behalf of candidates for president and vice president of the United States shall be subject to the provisions of this chapter. The director, upon the filing with him of a list of names and addresses of officers and members of such a committee under the provisions of section five, shall forthwith, by registered mail, return receipt requested, inform the candidate, in whose behalf said list is filed, of such filing, enclosing a duplicate of said list. Unless the candidate shall, within fourteen days after the receipt of such notification, consent in writing, signed by him and filed with the director, to the formation of such committee, such committee shall thereupon be ordered dissolved by the direcotr and, upon its dissolution, shall forthwith file a financial report under the provisions of section eighteen. If the candidate shall, within fourteen days after the receipt of such notification, consent in writing, signed by him and filed with the director, to the formation of such committee, such committee shall then be deemed to be organized as a non-elected political committee and be subject to the applicable provisions of this chapter. Candidates for nomination or election to the senate or house of representatives of the United States shall not be subject to the provisions of this chapter insofar as they may conflict with federal law. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 5. Statement of Organization of Political Committee; Treasurer; Separate Accounts; Penalties.

Each political committee shall organize by filing with the director or, if organized for the purpose of a city or town election only, with the city or town clerk, a statement of organization.

The statement of organization shall include: (1) the name of the political committee which, if organized on behalf of a candidate, shall include the name of the candidate in said name; (2) the address of the political committee; (3) a statement of the purpose for which the political committee is organized; (4) the name and residential address of the chairman and the treasurer; (5) the name, residential address, and position of other principal officers, including officers and members of the finance committee, if any, and; (6) the name and address, if known, and party affiliation of each candidate the political committee is supporting; provided, however, that if a candidate is nominated without reference to a political party, the name of his political party shall not be required.

The statement of a political committee organized on behalf of a candidate shall also include the written consent of said candidate. No candidate shall give his consent to more than one such committee.

Any change in information previously submitted in a statement of organization shall be reported to the director, or if organized for the purpose of a city or town election only, to the city or town clerk, within ten days following the change.

Each political committee shall have a treasurer who shall qualify for his office by filing a written acceptance thereof with the director, or if organized for the purpose of a city or town election only, with the city or town clerk. Said treasurer shall remain subject to all the duties and liabilities imposed by this chapter until his written resignation of the office is received or his successor's written acceptance is filed as aforesaid. No person acting under the authority of, or on behalf of, any political committee shall receive any money or anything of value, or expend or disburse the same, or incur expenses while it has no treasurer qualified as aforesaid, or while the name and address of any of its officers or members, as originally or subsequently chosen, is not filed in accordance with the provisions of this section or chapter fifty-two, as the case may be.

Each treasurer of a political committee shall keep and preserve detailed accounts, vouchers and receipts as prescribed for a candidate by the provisions of section two.

No expenditure shall be made for, or on behalf of, a political committee without the authorization of the chairman or treasurer, or their designated agents.

All funds of a political committee shall be kept separate from any personal funds of officers, members or associates of such committee.

Violation of any provision of this section shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 6. Receipt, Expenditure, and Investment of Money, etc.; Contributions to Other Political Committees; Penalties.

A political committee organized or operating on behalf of a candidate for the office of governor, lieutenant governor, attorney general, state secretary, treasurer and receiver general, or auditor may receive pay and expend money or other things of value for reasonable and necessary expenses directly related to the campaign of the candidate but shall not make any expenditure that is primarily for the candidate's or any other person's personal use, provided however, that the director shall establish reasonable rules and regulations concerning such expenditures; and provided, further, that no such committee, other than the state committee of a political party, may contribute to any other political committee or to the campaign fund of any other candidate.

Any other political committee, duly organized, may receive, pay and expend money or other things of value for the enhancement of the political future of the candidate or the principle, for which the committee was organized so long as such expenditure is not primarily for the candidate's or any other person's personal use, provided, however, that the director shall establish reasonable rules and regulations concerning such expenditures; and provided, further, that such committee may contribute to other political committees and may contribute to the campaign fund of a candidate; and provided, further, that the aggregate of all such contributions made by such a committee organized on behalf of a candidate to another non-elected political committee organized on behalf of a candidate shall not exceed in any one calendar year the sum of one hundred dollars; and provided further, that the aggregate of all such contributions made by such a committee organized on behalf of a candidate to other non-elected political committees organized on behalf of candidates shall not exceed in any one calendar year the sum of fifteen hundred dollars.

Such committee may place surplus funds in a savings account and may earn interest thereon but it may not invest its funds or other things of value in any other manner.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1975, 774, § 2, approved December 16, 1975; by § 5, effective July 1, 1976.)

[POLITICAL CONTRIBUTIONS]

§ 7. Authorized Purposes for Receipts and Expenditures; Limitation on Individual Contributions; Form for Payment for Goods or Services; Penalties.

No person or combination of persons including a corporation formed under the provisions of chapter one hundred and eighty, shall in connection with any nomination or election receive money or its equivalent, expend or disburse or promise to expend or disburse the same, except as authorized by this chapter. A political committe or a person acting under the authority or on behalf of such a committee may receive money or its equivalent, or expend or disburse or promise to expend or disburse the same for the purpose of aiding or promoting the success or defeat of a candidate at a primary or election or a political party or principle in public election or favoring or opposing the adoption or rejection of a question submitted to the voters, and for other purposes expressly authorized by this chapter subject, however, to the provisions thereof. Any individual may make campaign contributions to candidates or non-elected political committees organized on behalf of candidates; provided, that the aggregate of all such contributions for the benefit of any one candidate and the

non-elected political committee organized on such candidate's behalf shall not exceed in any one calendar year the sum of one thousand dollars. Any individual may in addition make campaign contributions for the benefit of elected political committees or non-elected political committees organized on behalf of a political party; provided, that the aggregate of such campaign contributions for the benefit of the political committees of any one political party shall not exceed in any one calendar year the sum of one thousand dollars. Any individual may in addition make campaign contributions not exceeding in any one calendar year the sum of one thousand dollars to non-elected political committees not organized on behalf of any candidate or candidates or political party. Any candidate may in addition make expenditures without limitation for the purposes of his own campaign and may make campaign contributions without limitation for the benefit of non-elected political committees organized on his behalf. Notwithstanding the provisions of this section an individual of less than eighteen years of age shall not make campaign contributions in an amount in excess of twenty-five dollars in the aggregate during any one calendar year. Any candidate required to designate a depository for campaign funds by section nineteen and any person acting for such a candidate or such a political committee shall pay for services rendered or goods sold in excess of the sum of fifty dollars only through or by the means of a check drawn upon such depository and bearing the legend "Campaign Account—(name of candidate or political committee)", and shall secure the signature of the person receiving such check to the following certificate to be printed on all such checks: "The undersigned affirms under the penalties of perjury that he is the named payee of this check or an authorized officer thereof, that he or it performed the services or delivered the goods indicated hereon, that the payment is for the sole purpose of paying for such goods or services and that no person other than the named payee has any interest, direct or indirect, in this payment".

Violation of any provision of this section shall be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 8. Certain Corporations Prohibited from Making Contributions; Exception; Penalties.

No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation. No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 9. Payment by Check of Contributions or Expenditures Exceeding a Certain Dollar Amount; Penalties.

No individual, candidate or political committee, or person acting on behalf of said individual, candidate, or political committee, shall accept a contribution of money from any one person or political committee if the aggregate amount contributed in a calendar year exceeds fifty dollars except by check or other negotiable instrument. No individual, candidate, political committee, or person acting on behalf of said individual, candidate, or political committee, shall make an expenditure for an amount exceeding fifty dollars except by check.

Any individual or candidate, or any person acting on behalf of said individual or candidate, or on behalf of a political committee, who violates any provision of this section shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1975, 373, approved June 21, 1975, effective 90 days thereafter.)

§ 10. Disclosure of Contributor's Identity; Penalty.

No person shall, directly or indirectly, make a campaign contribution in any name except his own nor in any manner for the purpose of disguising the true origin of the contribution nor unless he makes his name and residential address known to the person receiving such contribution at the time such contribution is made; nor shall any trust, foundation or association other than a political committee make a campaign contribution unless at the time such contribution is made there is also made known to the person receiving such contribution, the names and addresses of its principal officers. No candidate or political committee or person acting under its authority or in its behalf shall knowingly receive a campaign contribution, or knowingly enter or cause the same to be entered in the accounts or records of

such candidate or committee, unless the provisions of this section have been complied with.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (Added by 1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 11. Soliciting Payment, etc., From Candidates or Elected Officials Prohibited; Exceptions; Penalties.

No person, no political committee and no person acting under the authority of a political committee or in its behalf, shall demand, solicit, ask or invite from a candidate for nomination or election to public office, or a person occupying an elective public office, any payment or gift of money or other valuable thing, or promise of payment or gift of money or other valuable thing for advertising, gratuities, donations, tickets, programs, or any other purpose whatsoever; and no such candidate for nomination or election, and no one occupying an elective public office, shall make any such payment or gift, or promise to make any such payment or gift, to any person, political committee, or any person acting under the authority of a political committee, if such person or political committee has demanded, solicited, asked, or invited from him any such payment, gift or promise of payment or gift; but this section shall not apply to the soliciting or making in good faith of gifts for charitable or religious purposes.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 12. Soliciting Payment from Candidates for Delivery of Nomination Papers; Penalties.

No political committee, and no person acting under its authority or in its behalf, shall demand or solicit from any candidate for nomination to elective office, or from any one acting in his behalf, a payment of money or a promise of payment of money, as a prerequisite to his obtaining from such committee or its agent the nomination papers required by sections ninety-five to one hundred and one, inclusive, of chapter fifty-three.

Violation of any provision of this section shall be punished by a fine of not more than one hundred dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 13. Public Officers and Employees Prohibited from Soliciting Contributions; Exceptions; Penalty.

No person employed for compensation, other than an elected officer, by the commonwealth or any county, city or town shall directly or indirectly solicit or receive any gift, payment, contribution, assessment, subscription or promise of money or other thing of value for the political campaign purposes of any candidate for public office or of any political committee, or for any political purpose whatever, but this section shall not prevent such persons from being members of political organizations or committees. The soliciting or receiving of any gift, payment contribution, assessment, subscription or promise of money or other thing of value by a non-elected political committee organized to promote the candidacy for public office of a

person so employed for compensation by the commonwealth or any county, city or town, shall not be deemed to be a direct or indirect solicitation or receipt of such contribution by such person; provided, however, that no such gift, payment, contribution, assessment, subscription or promise of money or other thing of value may be solicited or received on behalf of such a person from any person or combination of persons if such person so employed knows or has reason to know that the person or combination of persons has an interest in any particular matter in which the person so employed participates or has participated in the course of such employement or which is the subject of his official responsibility.

Any appointed officer or employee convicted of violating any provision of this section may be removed by the appointing authority without a hearing.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 14. Solicitation of Contributions in Public Building Prohibited; Penalties.

No person shall in any building or part thereof occupied for state, county or municipal purposes demand, solicit or receive any payment or gift of money or other thing of value for the purposes set forth in section thirteen.

Any appointed officer or employee convicted of violating any provision of this section may be removed by the appointing authority without a hearing.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 15. Public Officers and Employees Prohibited from Making Contributions; Penalty.

No officer, clerk or other person in the service of the commonwealth or of any county, city or town shall, directly or indirectly, give or deliver to an officer, clerk or person in said service, or to any councillor, member of the general court, alderman, councilman or commissioner, any money or other valuable thing on account of, or to be applied to, the promotion of any political object whatever.

Nothing in this section shall be construed to prevent any person holding elective public office from contributing to a candidate or to an elected or non-elected political committee.

Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 16. Public Officers and Employees Not Required to Contribute or Render Political Service; Penalty.

No person in the public service shall, for that reason, be under obligation to contribute to any political fund, or to render any political service, and shall not be removed or otherwise prejudiced for refusing to do so.

Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 17. Coercion of Public Officers or Employees Prohibited; Penalty.

No officer or employee of the commonwealth or any of any county, city or town shall discharge, promote, or degrade an officer or employee, or change his official rank or compensation, or promise or threaten so to do, for giving withholding or neglecting to make a contribution of money or other valuable thing for a political purpose.

Violation of any provision of this section shall be punished by a fine of not less than one hundred nor more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

[STATEMENTS OF CONTRIBUTIONS AND EXPENDITURES]

§ 18. Filing of Reports of Contributions and Expenditures; Reporting Periods; Information Required; Penalties.

Each candidate and each treasurer of a political committee shall file with the director or, if the candidate seeks public office at a city or town election, or if the committee is organized for the purpose of a city or town election, with the city or town clerk, reports of contributions received and expenditures made on forms to be prescribed by the director. A committee organized under the provisions of section five to favor or oppose a question submitted to the voters shall file its reports with the director if the question appears on ballots at a state election, or with the city or town clerk if the question appears on ballots at a city or town election.

Such reports shall be filed as follows:

(a) by each candidate for nomination or election to the state senate or house of representatives, and by the non-elected political commit-

tee organized on behalf of such candidate, on or before: (1) the eighth day preceding a primary, the eighth day preceding a biennial state election, and, as a final report, the tenth day of January in the following year complete as to the thirty-first day of December of the prior year; (2) the eighth day preceding a special primary, including a convention or a caucus, the eighth day preceding a special election, the thirtieth day following a special election, and, as a final report, the tenth day of January in the following year complete as to the thirty-first day of December of the prior year.

(b) by each candidate for nomination or election to city or town office, and by the non-elected political committee organized on behalf of such candidate, except a candidate seeking election as a member of a representative town meeting or of a town or city ward committee, and any non-elected political committee organized on behalf of such candidate, on or before: (1) the eighth day preceding a city or town preliminary or primary, including a caucus, the eighth day preceding a city or town election, and if a city election, as a final report, the tenth day of January in the following year complete as to the thirty-first day of December of the prior year, and if a town election, as a final report, the thirtieth day following said election; (2) the eighth day preceding a special primary, including a caucus, the eighth day preceding a special election, and, as a final report, the thirtieth day following a special election.

(c) by each candidate and each non-elected political committee required to designate a depository by section nineteen on or before: (1) the third business day following the designation of such depository, and (2) as a final report, the tenth day of January of the year following the election, complete as to the thirty-first day of December of the prior year.

The reporting period of the initial report shall commence on the day following the preceding election for the office sought by the candidate, or on the day following the end of the reporting period of the last report filed, if any, whichever period is shorter, and shall end as of the day such depository is designated.

The reporting period of the second report shall commence on the day following the designation of the depository and shall end as of the thirty-first day of December of the year of the election.

(d) by the treasurer of each state committee referred to in section one of chapter fifty-two and required to designate a depository by section nineteen, on or before: (1) the third business day following the designation of such depository, and (2) as a final report, the tenth

day of January of the year following the election complete as to the thirty-first day of December of the prior year.

The reporting period of the initial report shall commence on the day following the preceding biennial state election, or on the day following the end of the reporting period of the last report filed, if any, whichever period is shorter, and shall end as of the day such depository is designated.

The reporting period of the second report shall commence on the day following the designation of the depository and shall end as of the thirty-first day of December of the year of the election.

(e) by all other non-elected and elected political committees which are not required to file reports as aforesaid, on or before: (1) the same days and in accordance with the same schedule as set forth in clause *(a)*, if the political committee is aiding or promoting the success or defeat of one or more candidates, or is favoring or opposing a question submitted to the voters, in a state primary or election; (2) the same days and in accordance with the same schedule as set forth in clause *(b)*, if the political committee is aiding or promoting the success or defeat of one or more candidates, or is favoring or opposing a question submitted to the voters, in a city or town preliminary, primary or election.

(f) by each political committee organized under the provisions of section five to favor or oppose a question submitted to the voters, if the question appears on the ballot at the state election on: (1) the day of the organization; and (2) the sixtieth day prior to the election; on or before (3) the fifth and twentieth day of each month complete as of the preceding first and fifteenth day of the month, until the election, and, thereafter; (4) the fifth day of each month until all declared liabilities of such committee have been discharged.

The reporting period of the initial report shall commence on the day following the preceding biennial state election, or on the day following the end of the reporting period of the last report filed, if any, whichever period is shorter, and shall end as of the day of organization.

The reporting period of the second report shall commence on the day following said day of organization and shall end as of the sixtieth day prior to the election.

The reporting period of all subsequent reports shall commence on the day following the end of the reporting period of the last report filed and shall end as of the first or fifteenth day of each month, as the case may be.

(g) by each political committee organized under the provisions of section five or favor or oppose a question submitted to the voters, if the question appears on the ballot at a city or town election on: (1) the day of organization; (2) on or before the thirtieth day following the election, and, thereafter; (3) on the fifth day of each month until all declared liabilities of such committee have been discharged.

The reporting period of the initial report shall commence on the day following the preceding city or town election, or the day following the end of the reporting period of the last report filed, if any, whichever period is shorter, and shall end as of the day of organization.

The reporting period of the second report shall commence on the day following the day of organization and shall end as of the day the report is filed.

The reporting period of all subsequent reports shall commence on the day following the end of the reporting period of the last report filed and shall end as of the first day of each month.

(h) by all candidates and all political committees, except those candidates seeking election as members of a representative town meeting, or of a city ward or town committee, and non-elected political committees organized on behalf of such candidates, on or before the tenth day of January in each year in which they are not otherwise required to file a report on or before the tenth day of January.

For candidates, and non-elected political committees organized on behalf of such candidate for whom said report would be an initial report, the reporting period shall commence on the day following the preceding election for the office sought by such candidate and shall end as of the thirty-first day of December of the year prior to the last day for filing; and for all other political committees for which said report would be an initial report, the reporting period shall commence on the day following the preceding state, city or town election, as the case may be, and in accordance with the provisions of this section governing said initial report of such committees, and shall end as of the thirty-first day of December of the year prior to the last day for filing said report. For all candidates and all political committees, if said report is not an initial report, the reporting period of such reports required to be filed on or before the tenth day of January in each year shall commence on the first day of January of the prior year, or on the day following the end of the reporting period of the last report filed, if any, whichever period is shorter, and shall end as of the thirty-first day of December of said prior year.

The reports required to be filed in accordance with the provisions of clauses *(a)* and *(b)*, except for the report to be filed in accordance with said provisions on or before the tenth day of January of the year following the election, shall not be required of a candidate, or of the non-elected political committee organized on behalf of said candidate, if the candidate is not a candidate as defined in clause (2) of the definition of candidate of section one.

Notwithstanding the provisions of clauses *(a)*, *(b)*, *(c)* and *(d)*, for those contributions received subsequent to the end of the reporting period of the last report filed, which was identified in said clauses as a final report, by a candidate or political committee, and intended for application to the preceding election of said candidate or of said reporting political committee, an additional report, which shall be the final report for such candidates and committees shall be required. This report shall be filed on or before the tenth day of January following the last day for filing said final report of clauses *(a)*, *(b)*, *(c)* and *(d)*, and shall be complete as of the thirty-first day of December of the prior year. The reporting period of said report shall commence on the day following the end of the reporting period of the last report, or final report required to be filed by said clauses.

Except as otherwise provided, each candidate and the non-elected political committee organized on behalf of said candidate, shall, upon the filing of the initial report, include all contributions received and expenditures made since the day of the preceding election for the office sought by the candidate, or since the end of the reporting period of the last report filed, if any, whichever reporting period is shorter, and all other political committees shall, upon the filing of their initial report, include all contributions received and expenditures made since: (1) the day of the preceding biennial state election, or the end of the reporting period of the last report filed, if any, whichever period is shorter, if the political committee is either aiding or promoting the success or defeat of one or more candidates, or is favoring or opposing the adoption or rejection of a question submitted to the voters, at a state primary or election, or (2) the day of the preceding city or town election, or the end of the reporting period of the last report filed, if any, whichever period is shorter, if the political committee is either aiding or promoting the success or defeat of one or more candidates, or is favoring or opposing the adoption or rejection of a question submitted to the voters, at a city or town preliminary, primary or election.

Except as otherwise provided, the end of the reporting period of each report required to be filed under the provisions of this section shall be as of the tenth day preceding the last day for filing. The

beginning of the reporting period for each report subsequent to the initial report shall be the day following the end of the reporting period of the last report filed.

The reports required to be filed by this section shall be cumulative during the calendar year to which they relate.

Where there has been no change in an item included in a previous report, only the amount of the item need be carried forward.

Whether or not a contribution has been received or an expenditure has been made during any reporting period as described in this section, a candidate or political committee shall file the required report for said reporting period.

Each report required to be filed under the provisions of this section by a candidate or a political committee shall disclose: (1) the amount of money on hand at the beginning of the reporting period; (2) the full name and residential address, listed alphabetically, of each person who has made a contribution, except for those contributions identified in clauses (5) and (6) of this paragraph and which shall be reported therein, in an amount or value of fifteen dollars or more, or twenty-five dollars or more, if the candidate or political committee is required to designate a depository in accordance with the provisions of section nineteen, in the reporting period, and such information for each contribution of less than the sum of fifteen dollars, or twenty-five dollars, if the aggregate of all contributions received from such contributor within said reporting period is the sum of fifteen dollars or more, or twenty-five dollars or more, as the case may be, and the amount or value and date of the contribution and the total of all contributions listed; provided, however, that any contributions resulting from any purchases from an individual, candidate, or political committee, or from a person acting on behalf of said individual, candidate, or political committee, whether through the device of tickets, advertisements, or otherwise, for any fund-raising activities, including testimonials, held on behalf of said individual, candidate, or political committee, regardless of the purpose of such activity, shall not be included together with those contributions reportable under the provisions of this clause; but shall be reported in clauses (3) and (7); (3) for those contributions resulting from such purchases as are excluded from clause (2), the full name and residential address, listed alphabetically, of each person who has made such purchases if the amount or value paid is fifteen dollars or more, or twenty-five dollars or more, if the candidate or political committee is required to designate a depository in accordance with the provisions of section nineteen, in the reporting period, and such information for each amount or value paid for such purchase of less than the sum of

fifteen dollars, or twenty-five dollars, if the aggregate of all amounts or value paid for such purchases made by said person within said reporting period is the sum of fifteen dollars or more, or twenty-five dollars or more, as the case may be, and the amount or value paid and date of the purchase and the total of all amounts listed; (4) the total amount or value of contributions made in the reporting period, except for those contributions resulting from such purchases as are excluded from clause (2), and not otherwise reported under clause (2); (5) the name and address, listed alphabetically, of each candidate or political committee from which was received, or to which was made, any transfer of money or anything of value, in the reporting period, together with the amount or value and date of such transfer; (6) the amount or value and date of each loan to or from any person, in the reporting period, together with the name and residential address of the lender and endorser, if any, listed alphabetically, and the amount or value and date of each loan; (7) for those contributions resulting from such purchases as are excluded from clause (2), the total amount or value paid for such purchases, in the reporting period, and not otherwise reported under clause (3); (8) the gross proceeds from such amounts or value paid for such purchases as are excluded from clause (2), in the reporting period, which is the sum of the totals reported by clauses (3) and (7); (9) the net proceeds from such amounts or value paid for such purchases as are excluded from clause (2), in the reporting period, which is the total amount or clause (8) minus the sum of clauses (12) and (13); (10) the total sum of all contributions received, in the reporting period, which is the sum of clauses (2), (4), (5), (6), and (9); (11) the full name and address, listed alphabetically, of each person to whom an expenditure is made, in the reporting period, in an amount or value of twenty-five dollars or more, the amount or value, date and purpose of each such expenditure and the total of all such expenditures listed, and in the case of a political committee supporting more than one candidate, the name and address, the elective office held, if any, and office sought by each candidate on whose behalf said expenditure was made; provided, however, that any expenditures resulting from such purchases as are excluded from clause (2) shall not be included together with those expenditures reportable under this clause; but shall be reported in clauses (12) and (13); (12) for those expenditures resulting from such purchases as are excluded from clause (11), the full name and address, listed alphabetically, of each person to whom an expenditure is made, in the reporting period, in an amount or value of twenty-five dollars or more, the amount or value, date and purpose of each such expenditure and the total of all such expenditures listed; (13) for those expenditures resulting from such purchases as are excluded

from clause (11), the total amount or value of such expenditures resulting from such purchases, in the reporting period, and not reported otherwise under clause (12); (14) the total amount or value of expenditures made in the reporting period, except those excluded from clause (11), and not otherwise reported under clause (11); (15) the total sum of expenditures made, in the reporting period, which is the sum of clauses (11) and (14); (16) the amount and date of each then existing liability remaining unfulfilled and in force when the report is made, the name and address of the person to whom the liability exists, and a clear statement of the purpose for which it was incurred; (17) a listing of all banks or other financial institutions used; and (18) in the event of the dissolution of a political committee, a statement of such dissolution detailing the intended or actual disposition of any residual funds.

In addition, the report required to be filed on or before the tenth day of January shall contain a statement detailing the intended or actual disposition of any residual funds.

Violation of any provision of this section shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 19. Depository of Campaign Funds; Restrictions on Deposits and Expenditures; Filing Bank Statement and Summary of Contributions with Director; Penalties.

(a) Candidates for nomination or election to the offices of governor, lieutenant governor, secretary of state, attorney general, state treasurer and receiver general, auditor, United States senator, United States representative, governor's councillor, district attorney, clerk of court, register of probate and insolvency, register of deeds, county commissioner, county treasurer, and sheriff, and the treasurer of each state committee referred to in section one of chapter fifty-two, and the treasurer of the non-elected political committee authorized by any

of the aforesaid candidates or organized on behalf of a candidate for president or vice president of the United States shall, forthwith, upon the organization of said political committee, or upon becoming a candidate in accordance with the provisions of clauses (1) or (2) of the definition of candidate in section one, designate as a depository for campaign funds of such candidate or political committee a national bank authorized to transact business in the commonwealth or a trust company organized and existing under the laws of the commonwealth. Each such candidate and the treasurer of each such political committee shall file with the director, no later than the third business day following the designation of such depository, a certificate of appointment containing the name of the bank or trust company so designated, and the name of the candidate or political committee, and shall authorize the bank or trust company so designated to submit the reports required by subsection *(e)*.

(b) Every candidate and the treasurer of every committee required to designate a depository shall, by the end of the third business day after receipt of any contribution deposit it in the form received in the designated depository. No such deposit shall be made or received to the credit of any account designated as provided for in this section unless such deposit shall be accompanied by a deposit slip containing for each contribution in excess of the sum of twenty-five dollars the name and address of the contributor in the case of an individual or political committee and in addition in the case of a trust, foundation or other association the data required by section ten; provided that such information shall also be listed for each contribution of less than the sum of twenty-five dollars if the aggregate of all contributions deposited from such contributor during the preceding fourteen days is the sum of twenty-five dollars or more. If any deposits represent the proceeds of borrowings, the deposit slip shall indicate the names and addresses of the lender, those persons liable either primarily or secondarily for any portion of such borrowings and those persons providing collateral, if any, for such borrowings.

(c) All payments for campaign purposes made by or for the benefit of a candidate or by the treasurer of a committee required to designate a depository after the date such depository is required to be designated which are in excess of fifty dollars shall be made only from funds on deposit in said depository through checks drawn on such depository and indicating that such checks are drawn on the campaign account of the candidate or the political committee involved. All checks drawn on such campaign accounts shall be payable either to the order of a named payee not the candidate or treasurer or, if for no more than fifty dollars, may be payable to the candidate

or treasurer, except that the total of checks payable to the candidate or treasurer for each period under subsection *(e)* hereof shall not exceed five hundred dollars, and shall contain printed thereon a statement of purposes as follows:—

PURPOSES OF PAYMENT.

(Check One and Fill in Specific Purpose)

TV, Radio	Printing	Signs or Displays .....
Newspaper	Office	Transfer of Fund .....
Meetings.....	Travel.....	Other.....

Specific Purpose .....

Such checks shall also contain thereon for signature by the named payee, the certificate required by section seven.

(d) No candidate or committee treasurer required to designate a depository for campaign funds shall authorize the incurring of any expenditure in behalf of the candidate or a committee unless there are monies on deposit in the depository designated in accordance with the provisions of this section to the credit of the campaign account of such candidate or committee sufficient to pay the amount of expenditures so authorized, together with all other expenditures previously authorized and still outstanding, or unless such candidate or treasurer files with the director on the dates indicated in subsection *(e)* hereof a complete statement of all unpaid obligations then outstanding, the terms of payment, purpose of the expenditure by which the obligation was created and name and address of the person holding the obligation.

(e) The cashier or treasurer of the bank, selected by any candidate or committee as above provided, shall file with the director by the fifth and twentieth of each month while such account is in existence, a statement of the balance as of the preceding first or fifteenth of the month together with a summary of all of the deposit slips presented to the bank since the last such statement with any deposit of monies to the campaign account of such candidate or committee, listing the names alphabetically and other data as to all donors as it appeared on the deposit slip, and a list of all the checks presented to the bank since the last such statement upon which any funds were withdrawn from any such account with the names and addresses of the payees and the amount of each check, and the purposes for which the money was paid as thereon indicated.

(f) Such accounts shall remain in existence until the election and so long thereafter as a candidate or political committee has unpaid obligations still outstanding. A candidate or the treasurer of a

political committee which has such obligations shall file with the director by the fifth of each month a summary of all campaign contributions (including campaign contributions in the form of forgiveness of indebtedness) received during the preceding month together with the name and address and all other data as to each such contributor required by section ten.

Any candidate or political committee which fails to file any report required by this section shall be assessed, and shall pay to the state treasurer, a penalty not greater than ten dollars for each day such candidate or political committee has not filed such report.

Violation of any provision of this section shall be punished by imprisonment for not more than six months or by a fine of not more than five hundred dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1977, 829, §§ 16, 17, approved, with emergency preamble, Dec. 20, 1977.)

§ 20. Campaign Media Expenses; Limitations; Reports; Penalties.

As used in this section "Campaign media expenses" shall mean only such liabilities incurred, or expenditures made, for television or radio time or for newspaper, billboard, or magazine advertising, advertising agency, public relations, printing, opinion polling, computer, telephone, telegraph, and such postage expenses as may be incurred in the mailing of campaign literature on behalf of the candidate, used during the calendar year of the election, whether such liabilities were incurred or expenditures were made prior to, or during, said calendar year.

For purposes of this section, the campaign media expenses incurred by a candidate, and which will be reported by him, shall include only such liabilities incurred, or expenditures made, on behalf of a candidate, by a candidate, a non-elected political committee organized on his behalf, or by any other person who acted with the prior knowledge and consent of said candidate.

Candidates who are required to designate a depository by section nineteen shall file an accounting of their campaign media expenses with the director in the year of the election, on or before: (1) the tenth day of March and June, the eighth day preceding a primary, the eighth day preceding a biennial state election, and the tenth day of January in the following year complete as to the thirty-first day of December of the prior year; (2) the thirtieth day and the eighth day preceding a special primary, including a convention or a caucus, the eighth day preceding a special election, and the tenth day of January of the following year complete as to the thirty-first day of December of the prior year.

Candidates for state senator and representative to the general court shall file an accounting of their campaign media expenses with the director in the year of the election, on or before: (1) the eighth day preceding a primary, the eighth day preceding a biennial state election, and by the tenth day of January of the following year complete as to the thirty-first day of December of the prior year; (2) the eighth day preceding a special primary, including a convention or caucus, the eighth day preceding a special election, and the thirtieth day following a special election.

Each report shall include the name and address of each person to whom a liability exists or an expenditure is made, the amount or value, date and purpose. Said reports shall be cumulative.

The reporting period of the initial report required to be filed in the year of the election under the provisions of this section shall commence on the first day of January in said year. The end of the reporting period of each report required to be filed under the provisions of this section shall be as of the tenth day preceding the last day for filing. The beginning of the reporting period for each report subsequent to the initial report shall be the day following the end of the reporting period of the last report filed.

Violation of any provision of this section shall be punished by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1977, 294, § 1, approved, with emergency preamble, June 14, 1977.)

§ 21. Campaign Media Expenses; Reports by Persons, etc., Receiving Payment.

All persons, firms and corporations establishing an account receivable or receiving payment for television or radio time or for newspaper, billboard, magazine advertising, advertising agency, public relations, printing, opinion polling, computer expenses, from any candidate or political committee which is required to file campaign media expense reports, or from any person on behalf of such candidate, shall by the first day of each month, complete, as of the twentieth day of the previous month and transmit a report of such accounts receivable or payments made to the director on a form furnished by the director, who shall file all documents received pursuant to this section in his office. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 22. Statement of Corporate Contribution; Penalties.

The treasurer of any corporation mentioned in section eight which has given, paid, expended or contributed, or promised to give, pay, expend or contribute, any money or any valuable thing in order to influence or affect the vote on any question submitted to the voters which materially affects any of the property, business or assets of the corporation, shall file reports with the director setting forth the amount or value of every gift, payment, expenditure or contribution or promise to give, pay, expend or contribute, together with the date, purpose, and full name and address of the person to whom it was made.

Such reports shall be filed as follows:—

(1) the sixtieth day prior to the election; on or before (2) the fifth and twentieth day of each month complete as of the preceding first and fifteenth day of the month, until the election, and, thereafter; (3) the fifth day of each month until all declared liabilities have been discharged.

Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1975, 491, approved July 14, 1975, effective 90 days thereafter.)

Section 22A. The treasurer of any city, town, or other governmental unit which has given, paid, expended or contributed, or promised to give, pay, expend or contribute any money or any valuable thing in order to influence or affect the vote on any question submitted to the voters of the commonwealth shall file reports with the director setting forth the amount or value of every gift, payment, expenditure of contribution or promise to give, pay, expend or contribute, together with the date, purpose, and full name and address of the person to whom it was made.

The treasurer of any city, town, or other governmental unit which has given, paid, expended or contributed, or promised to give, pay, expend or contribute any money or any valuable thing in order to influence or affect the vote on any other question submitted to the voters of any city or town or any part of any city or town, shall file reports with the clerk of such city or town setting forth the amount or value of every gift, payment, expenditure of contribution or promise to give, pay, expend or contribute, together with the date, purpose, and full name and address of the person to whom it was made.

Such reports shall be filed as follows: —

(1) the sixtieth day prior to the election; on or before (2) the fifth and twentieth day of each month complete as of the preceding first and fifteenth day of the month, until the election, and thereafter; (3) the fifth day of each month until all declared liabilities have been discharged.

Any officer of a governmental unit violating any provision thereof or authorizing such violation, or any person who violates or in any way knowingly aids or abets the violation of any provision thereof, shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both.

The director of campaign and political finance, or in the case of a city or town, the clerk of such city or town, shall examine the accounts submitted by cities and towns for political expenditures, and may order restitution of public funds which have been adjudicated to have been spent contrary to law by public officials. Nothing contained herein shall be construed as authorizing the expenditures of public monies for political purposes. (1978, 572, approved July 22, 1978.)

§ 23. Accounting to Treasurer for Funds Received or Expended; Penalties.

Whoever, acting under the authority or in behalf of a political committee, receives any money or its equivalent, or promise of the same, or expends or incurs any liability to pay the same, shall, on demand, and in any event within three business days after such receipt, expenditure, promise or liability, give to the treasurer a detailed account of the same, with all vouchers required by this chapter, which shall be a part of the accounts and files of such treasurer.

Violation of any provision of this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 24. Filing Statements with Appropriate Officers; Form of Indorsement.

If the statement required to be filed by a candidate, treasurer or other person relates to a nomination or election to a city or town office, or to a question appearing upon the official ballot used at a city or town election, the statement shall be filed with the clerk of the city or town involved; all other such statements shall be filed with the director. All such statements shall be signed under the penalties of perjury. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 25. Retention of Reports and Statements by Director; Public Inspection and Copying.

The director shall retain all statements and reports filed with his office under the provisions of this chapter until the term of the office the candidate is seeking has ended. In the case of committees other than those authorized by a candidate, the director shall retain all required statements and reports filed with his office for a period of two years.

The director shall make all statements and reports required to be filed with him by this chapter available for convenient public inspection and reproduction by a copying machine at a commercially reasonable fee as soon as such statements and reports are filed with him. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 26. Retention of Reports and Statements by City or Town Clerk; Public Inspection and Copying.

The city or town clerk shall retain all reports and statements required to be filed with him until the term of the office the candidate is seeking has ended. In the case of committees other than those authorized by a candidate, the city or town clerk shall retain all required statements and reports filed with his office for a period of two years. Such statements and reports shall be available for convenient public inspection and copying at the office of the city or town clerk during normal business hours as soon as such statements and reports are filed with him. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 27. Furnishing Forms to Officials and Candidates; Furnishing Summaries of Laws.

The director shall furnish a city and town clerks at the expense of the commonwealth, blanks and forms approved by him and by the attorney general, suitable for the submission of such statements and reports as are required by this chapter. The city and town clerk shall transmit said blanks to all candidates for nomination or election to city or town office, who are known to him, and to all political committees required to file with him. The director shall transmit said blanks to all candidates for nomination to state or county office, who are known to him, and to all political committees required to file with him. Such blanks shall be furnished upon request to any person or political committee required to file a statement or report.

The director shall provide to all candidates and political committees required to file with him a summary of this chapter and all other laws of the commonwealth relating to contributions and expenditures, and shall furnish to city and town clerks, at the expense of the commonwealth sufficient copies of said summary so that they may provide said summary to all candidates and political committees required to file with them. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 28. Inspection of Statements and Reports; Correcting Deficiencies.

The director shall inspect all statements and reports of candidates, or non-elected political committees supporting such candidates, filed with him, and the clerks of cities and towns shall inspect all such statements and reports filed with them, within thirty days of the reporting dates required by this chapter, and all other statements and reports within sixty days of the reporting dates required by this chapter. If upon examination of the records it appears that any candidate or political committee has failed to file a statement or report as required by law, or if it appears to the director that any such statement or report filed with him does not conform to law, or if it appears to a city or town clerk that such statement or report relating to a city or town nomination or election does not conform to law, or upon written complaint by five registered voters that a statement or report does not conform to law, or that any candidate or political committee has failed to file a statement or report required by law, the director or city or town clerk, as the case may be, shall, in writing, notify the delinquent person. Such complaint shall state in detail the grounds of objection, shall be sworn to by one of the subscribers, and shall be filed with the director or with the proper city ot town clerk within ten days after the required date for filing a statement or report, or within ten days after the actual filing of a statement or report, or an amended statement or report. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 29. Procedure upon Failure to File Report or upon Discovery of Violation.

Upon failure to file a statement or report within ten days after receiving notice under section twenty-eight, or if any statement filed after receiving such notice discloses any violation of any provision of this chapter, the director in accordance with section three, or the city or town clerk, as the case may be, shall notify the attorney general thereof and shall furnish him with copies of all papers relating thereto, and the attorney general, within two months thereafter, shall examine every such case, and, if satisfied that there is cause, he shall in the name of the commonwealth institute appropriate civil proceedings or refer the case to the proper district attorney for such action as may be appropriate in the criminal courts. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 30. Judicial Enforcement of Filing Requirements; Procedure.

The supreme judicial or superior court may compel any person failing to file a statement as above required, or filing a statement not conforming to the foregoing requirements in respect to its truth, sufficiently in detail, or otherwise, to file a sufficient statement, upon the application of the attorney general or district attorney or petition of any candidate voted for, or of any five persons qualified to vote at the election on account of which the expenditures, or any part thereof, were made or are alleged to have been made. Such petition shall be filed within sixty days after such election, if the statement was filed within the thirty days required, but a petition may be filed within thirty days of any payment not included in the statement so filed. Proceedings under this section shall be advanced for speedy trial upon the request of either party. No petition brought under this chapter shall be discontinued without the consent of the attorney general. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 31. Immunity for Witnesses.

No person compelled to testify in any proceedings under section thirty shall be liable to criminal prosecution for any matters or causes in respect of which he shall be examined or to which his testimony shall relate, except to prosecution for perjury committed in

such testimony. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

[CORRUPT PRACTICES]

§ 32. Corrupt Practices.

A candidate shall be deemed to have committed a corrupt practice who commits any of the following offences:

Making or permitting any person or non-elected political committee authorized by him to make a false return in any statement filed under sections eighteen, nineteen and twenty-four by him or on his behalf.

Making a false return in any statement filed under sections eighteen and twenty-four by a candidate for nomination or election.

Any candidate fraudulently and wilfully obstructing and delaying a voter, interfering with, hindering or preventing an election officer from performing his duties, forging an endorsement upon, altering, destroying or defacing a ballot, tampering with or injuring or attempting to injure any voting machine or ballot box to be used or being used in a primary or election, or preventing or attempting to prevent the correct operation of such machine or box. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 33. Election Petitions; Procedure; Defenses; Initiating Criminal Action.

(a) If the attorney general or five or more voters have reasonable cause to believe that a corrupt practice, as defined in section thirty-two, has been committed by any successful candidate, other than a candidate for the United States Congress, or for the general court, for whom such voters had the right to vote, with reference to his election, or by any other person in his interest or behalf with reference thereto, the attorney general or such voters may apply to a justice of the superior court, sitting in equity within and for Suffolk county, for leave to bring an election petition against such candidate praying that the election of such candidate be declared void. Such

application shall be subscribed and sworn to by the petitioners and it shall be heard ex parte by the justice of the superior court upon such evidence as he may require; and if the petitioners shall establish to his satisfaction that there is reasonable cause to believe that a corrupt practice has been committed with reference to the election of the candidate in question, which materially affected the results of the election, and that upon the evidence obtainable there is reasonable cause to believe that such violations may be proved, he shall make an order granting leave to the petitioners to bring an election petition against such candidate.

(b) After the entry of such order, and within two months after the election to which it relates, the election petition may be filed in the superior court within and for Suffolk county.

Notice of the petition shall be by writ of subpoena according to the usual course of proceedings in equity and shall be returnable fourteen days after the date on which the petition is filed.

A subpoena issued upon an election petition shall be served not less than seven days before the return day.

A defense to an election petition shall be by answer, filed within seven days after the return day, and no replication need be filed.

Election petitions shall be entered on the equity docket.

(*c*) Election petitions and all motions and other applications, whether interlocutory or final, and all hearings on the merits or upon the making, entering or modifying of decrees therein shall be heard and determined by three justices of the superior court who shall, immediately following the filing of an election petition, be assigned by the administrative justice of said court for the hearing and determination of all matters arising under election petitions prior to the next state election. No reference to a master shall be had upon any matter arising under an election petition, except in matters of fact relating to financial statements and the examination of accounts and vouchers. All proceedings under election petitions shall have precedence over any case of a different nature pending in any court, and the justices of the superior court may from time to time make such rules regulating the practice and proceedings in matters of such election petitions, not inconsistent with this chapter, as they deem expedient. In the absence of any such rules, the practice and procedure in election petitions shall be governed by such laws or rules of court, not inconsistent with this chapter, as may from time to time be in force relating to the practice and proceedings in matters of equity.

(*d*) Upon an election petition the decision of the three justices of

the superior court assigned as aforesaid, or of a majority of them, shall be final and conclusive upon all matters in controversy, whether interlocutory or final, and whether in matters of fact or matters of law. But the said justices, or a majority of them, may, after a finding of facts, either of their own motion or at the request of either party, report the case to the supreme judicial court for determination by the full court; and thereupon like proceedings shall be had as upon a report after a finding of facts by a justice of the superior court in equity proceedings.

(e) If upon an election petition one or more violations of section thirty-two are proved, it shall be a defense to the petition if the defendant establishes to the satisfaction of a majority of the justices hearing the same, with reference to all said violations, the following:

As to every such violation, either that

(1) Such violation was not committed by the candidate, but was committed contrary to the orders and without the sanction or connivance of the candidate;

(2) The participation, if any, of the candidate in such violation, arose from inadvertence or from accidental miscalculation, or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith;

(3) The candidate took all reasonable means for preventing the commission of violations of this chapter with reference to the election in question;

(4) The violation in question was of a trivial, unimportant and limited character;

(5) The violation in question did not materially affect the results of the election.

(f) The court may by an order make the final disposition of an election petition conditional upon the filing of a statement required by this chapter in a modified form, or within an extended time, and upon compliance with such other terms as the court may deem best calculated to carry into effect the objects hereof, and in such case the court shall require, within a time certain, further proof as to the compliance with the conditions of such order, whereupon a final decree shall be entered.

(g) If upon the hearing of an election petition a majority of the justices hearing the same shall find that in relation to the election of the candidate in question a corrupt practice, as defined in section

thirty-two, was committed by the defendant, a decree shall be entered subject to the limitations and conditions hereinbefore prescribed, declaring void the election of the defendant to the office in question, and ousting and excluding him from such office and declaring the office vacant.

(h) No person called to testify upon an election petition shall be excused from testifying or producing any papers on the ground that his testimony may tend to criminate him or subject him to a penalty; but he shall not be prosecuted or subjected to any penalty or forfeiture except forfeiture of election to office, for or on account of any action, matter or thing concerning which he may so testify, except for perjury committed in such testimony.

(i) No decree entered upon an election petition shall be a bar to or affect in any way any criminal prosecution of any candidate or other person, or any inquest in accordance with sections thirty-five to forty-one, inclusive.

(j) A certified copy of any final decree entered upon an election petition, as provided by this chapter, shall forthwith be transmitted by the clerk to the director; and any vacancy in any office created by any such decree shall be filled in the manner provided by law in case of the death of the incumbent, but in no case shall the candidate so excluded from the office be eligible therefor.

(k) If upon the hearing of an election petition it shall appear to a majority of the justices hearing the same that with reference to the election in question there is a reasonable presumption that any violation of this chapter was committed, they shall cause notice of the facts to be given by the clerk of said court to the district attorney for the county where the violation appears to have been committed, with a list of the witnesses to establish the violation, and any other information which they may consider proper; and thereupon the district attorney shall cause complaint therefor to be made before a court or magistrate having jurisdiction thereof, or shall present the evidence thereof to the grand jury. If it shall appear that a successful candidate for district attorney has been guilty of any such violation, a majority of said justices shall order the notice of the facts to be given to the attorney general, who shall designate a district attorney to make such complaint or presentment. A majority of said justices may issue process for the apprehension of any person so appearing to have committed a violation of this chapter, and may bind over, as in criminal prosecutions, such witnesses as they deem necessary to appear and testify at the court having jurisdiction of the crime. **(1975, 151, § 1, approved, with emergency preamble, April 28, 1975; 1978, 478, § 34, approved July 18, 1978.)**

§ 34. Applicability of GL c. 55, §§ 1–33; What Constitutes a Political Committee.

Sections one to thirty-three, inclusive, shall apply to all public elections and to elections by the general court and by city councils and by either branch thereof, and, so far as applicable, to the nomination by primaries, caucuses, conventions and nomination papers of candidates to be voted for at such elections. The term "political committee" as defined in section one shall not apply to the proprietors and publishers of publications issued at regular intervals, in respect to the ordinary conduct of their business, nor shall they, in respect thereto, be subject to sections two to six, inclusive, of this chapter. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

[ELECTION INQUESTS]

§ 35. Inquest by District Court upon Complaint of Violation of Laws Relating to Voters, Ballots, etc.

Upon a complaint subscribed and sworn to by any person before a district court, alleging that reasonable grounds exist for believing that any law relating to the qualification or registration of voters, or to voting lists or ballots, or to primaries, caucuses, conventions and elections, or to any matters pertaining thereto, has been violated, such court may at once hold an inquest to inquire into such alleged violation of law. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 36. Inquest; Exclusion of Public; Separation and Examination of Witnesses.

The court may exclude all persons whose presence is not necessary at such inquest; and may also direct the witnesses to be kept so separated that they cannot converse with each other until they have been examined. The attorney general, the district attorney, or some person designated by either, shall attend the inquest and examine the witnesses. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 37. Inquest; Subpoenas of Witnesses.

Such court or attorney may issue subpoenas for witnesses, who shall be allowed the same fees, whose attendance may be enforced in the same manner, and who shall be subject to the same penalties, as if served with a subpoena in behalf of the commonwealth in a criminal prosecution before such court. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 38. Inquest; Stenographer; Reporting Violations to Superior Court.

Such court may employ a stenographer and may have the proceedings reduced to writing; and, if he finds that the law has been violated, shall report to the superior court all the material facts and the names of any persons guilty of any such violation. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 39. Inquest; Binding Witnesses Over for Superior Court Action.

The court may bind over, as in criminal prosecutions, such witnesses as are necessary, or as said attorney may designate, to appear and testify in the superior court. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 40. Inquest; Issuance of Process for Apprehension of Violators.

If a person charged by the report with the commission of an offence is not in custody, the court shall forthwith issue a process for his apprehension; but such process may issue before the filing of said report, if otherwise lawful. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

§ 41. Inquest; Witnesses' Immunity from Prosecution.

No person shall be excused from testifying or producing any papers in any inquest proceedings under sections thirty-five to forty, inclusive, on the ground that his testimony may tend to criminate him or subject him to a penalty or forfeiture, but he shall not be prosecuted or be subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he may be required so to testify, except for perjury committed in such testimony. (1975, 151, § 1, approved, with emergency preamble, April 18, 1975.)

[PENALTIES FOR CORRUPT PRACTICES]

§ 42. Removal from Roll of Registered Voters upon Criminal Conviction or Adverse Civil Judgment.

The director in proceedings based upon an election petition, as provided in section thirty-three, and the clerk of the court wherein a person is convicted of a violation of any provision of law relating to corrupt practices in elections, shall, within ten days after final judgment on such election petition or conviction, forward to the clerk of the city or town where the defendant resides a certified copy of the record of the final judgment or conviction, and the name of such person shall forthwith be stricken from the roll of registered voters of the city or town for a period of three years. (1975, 151, § 1, approved, with emergency preamble, April 28, 1975.)

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978.

No. A-355 (78-649)

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, and JOHN WEIS,

APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDELL, and WILLIAM M. YATES,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS

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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS

Pursuant to Rule 16(1)(b), appellees move this Honorable Court to dismiss the appeal herein on the ground that it presents no substantial federal question warranting review by this Court.

I. The State Law Involved and the Nature of the Case

A. *The State Law*

Appellants erroneously contend that the court below interpreted a state statute, Mass. Gen. Laws Ann. ch. 55, so as to impose "a flat ban on municipal speech" (Jurisdictional Statement 2). In fact, the Massachusetts Supreme Judicial Court determined that, as a matter of state law, a municipal ordinance and appropriation adopted by the appellants exceeded municipal powers under the "home rule" provisions of the Massachusetts Constitution. The pertinent state constitutional provision provides:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. Mass. Const. Amend. Art. 2, §6.

B. *Prior Proceedings*

The appellees, eleven taxable inhabitants of the City of Boston (J.S. 1a, 26a), commenced this action pursuant to a Massachusetts statute, Mass. Gen. Laws Ann. ch. 40, §53, which permits ten or more taxable inhabitants to challenge illegal municipal appropriations. The appellees sought to restrain the appellants from spending public funds and using public employees and other public resources to urge approval by Massachusetts voters of a referendum proposal to amend the Massachusetts Constitution. The proposed

amendment would permit the Massachusetts legislature to classify real property according to its use in no more than four classes for the purpose of taxing such property differently by class (J.S. 27a).

The appellants support the proposed amendment and urge passage of the referendum question (hereinafter "the Classification Referendum question") (J.S. 27a). On June 7, 1978, a five-four majority of the City Council passed and Mayor White approved an ordinance and appropriation authorizing the expenditure of $975,000 in public funds to urge voter approval of the Classification Referendum question (J.S. 2a, 3a, 27a-29a).

On June 23, 1978 the appellees commenced this action in the Massachusetts Supreme Judicial Court to enjoin the expenditure of the $975,000 appropriation. After hearings before a single justice, the case was reserved and reported to the full Supreme Judicial Court on the pleadings and an Agreed Statement of Facts (J.S. 2a). Both parties submitted briefs, and the case was argued to the full court on July 13, 1978 (J.S. 5a). On July 19, 1978, the Supreme Judicial Court entered a brief order enjoining the appellants from expending the appropriated funds and indicating that an opinion would follow (J.S. 38a). On August 23, 1978, the Supreme Judicial Court denied the appellants' motions for a stay of the order and for a rehearing and issued its unanimous opinion (J.S. 1a, 44a). Final judgment was entered in the court below on October 4, 1978 (J.S. 25a).

On October 17, 1978, appellants filed a Notice of Appeal below (J.S. 45a) and an Application for Stay in this Court. On October 20, 1978, Mr. Justice Brennan, as Circuit Justice, granted the requested stay. On November 6, 1978, this Court denied appellees' motion to vacate stay. Mr. Justice Stevens, with whom Mr. Justice Stewart and Mr. Justice Rehnquist joined, dissented.

II. Argument

A. The City of Boston Has No First Amendment Right of Free Speech.

The central premise of appellants' argument is that municipalities have a First Amendment right of free speech. No decision—in this Court or elsewhere—has recognized such a constitutional right. As the court below noted, the highest courts of California, Illinois, Arizona and New Jersey have held:

> without discussion of . . . freedom of speech, that a municipality or a similar political subdivision may not expend public funds for the purpose of influencing the result on an election question. (J.S. 12a n.12).

Prior to the opinion below, the only reported decision which squarely addressed the issue of an asserted "governmental right of free speech" flatly rejected the existence of such a right:

> [T]he issue raised by the instant application is not one concerning freedom of speech or association, but whether it is a proper function of a state agency to actively support a proposed amendment to the state constitution which is about to be presented to the electorate in a statewide referendum. *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 449-50, 375 N.Y.S.2d 235, 237 (Sup. Ct. 1975) (governmental expenditures to influence referendum election enjoined).

Historically, this Court has always viewed the First Amendment as a barrier *against* governmental interference, not a grant of protection *to* government. *See Columbia*

Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring). Commentators have expressed a similar sentiment:

> The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents. T. Emerson, The System of Freedom of Expression 700 (1970) (footnote omitted).

Since the appellants have failed to demonstrate the existence of a municipal right of free speech, this appeal presents no substantial federal question.

B. The Appellants' Reliance on *Buckley* and *Bellotti* Is Misplaced.

Faced with a total absence of decisional support for their assertion of a municipal right of free speech, the appellants have attempted to fashion an underpinning for their contentions from the holdings in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978). The appellants' reliance is misplaced.

Any equation in *Buckley* of the right to speak with the right to spend money involved limitations on the expenditure of private funds, not the propriety of appropriating public funds. The court below, unlike appellants, properly noted the distinction:

> Another aspect of the question whether protected speech is implicated here at all concerns whether the appropriation of public funds involves protected speech. We know that the act of making political contributions and expenditures involves protected speech

> and not merely conduct. *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). *The means by which a donor acquires funds* which are given to finance political expression *is one step further removed from the expression itself* and was not considered in *Buckley* v. *Valeo.* Surely, the First Amendment does not justify the stealing of funds or of a printing press because the defendant was planning to use the funds or the printing press to publish his views on a subject of public concern. Governmental restraint, even prior restraint, plainly is appropriate in such a case . . . . (J.S. 16a n.15) (emphasis added).

The appellants' reliance on *Bellotti* is similarly misplaced. The appellants argue from *Bellotti* that "speech" is protected regardless of its source (J.S. 12-27). Yet the very quotation from *Bellotti* on which the appellants rely indicates that the various "sources" which equally deserve constitutional protection are all private, rather than governmental, sources:

> The . . . inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, *whether corporation, association, union, or individual. Bellotti, supra,* 435 U.S. at 777, quoted at J.S. 13 (emphasis added).

In fact, *Bellotti* invokes the First Amendment in traditional fashion, as a bulwark against governmental interference with a private right. It prohibited the state's enforcement of a criminal statute against a private corporation. In attempting to find support in *Bellotti* for their asserted "governmental right of free speech," the appellants twist the words of *Bellotti* in a manner that ignores the facts of that case and the intention of this Court.

The appellants also assert that the court below construed Mass. Gen. Laws Ann. ch. 55, a portion of which was invalidated in *Bellotti,* to ban the challenged expenditures (J.S. 7 n.4). In their eagerness to identify this case with *Bellotti,* appellants mistate the holding of the court below. In fact, the Supreme Judicial Court carefully noted that Mass. Gen. Laws Ann. ch. 55 does not even refer to municipalities or municipal expenditures (J.S. 9a). It viewed the governing law of this case to be the "home rule" provisions of the Massachusetts Constitution:

> The issue at the heart of the dispute concerning the city's authority to appropriate funds for the purpose of influencing the result on the referendum question is whether the city's purported home rule ordinance is inconsistent with any law enacted by the Legislature under the powers reserved to it under the Home Rule Amendment. (J.S. 7a).

The Supreme Judicial Court noted that ch. 55 is "comprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing. . . ." (J.S. 8a). Yet ch. 55 contains no reference to municipalities:

> We interpret G.L. c. 55 as intended to reach all political fund raising and expenditures within the Commonwealth. The absence of any reference to municipal corporations is significant . . . as an indication that the Legislature did not even contemplate such municipal action could occur. (J.S. 9a).

From this omission the court below concluded:

> A municipality has no authority to appropriate funds for the purpose of taking action to influence the result

> of a referendum proposed to be submitted to the people at a State election. We reach this conclusion on the basis of the existence of broad regulatory legislation concerning the collection and expenditure of funds for election purposes. (J.S. 6a).
>
> . . . we agree with the plaintiffs that the appropriation of funds by a municipality for the purpose of influencing the vote on a Statewide referendum question is "inconsistent with . . . laws enacted by the general court." (J.D. 7a-8a) *quoting* Mass. Const. Amend. Art. 2, §6.

Contrary to the appellants' assertion that the court below interpreted Mass. Gen. Laws Ann. ch. 55 as a "flat ban on speech" (J.S. 10), the Supreme Judicial Court held that it was the Home Rule Amendment which prohibited the expenditures of public funds. Mass. Gen. Laws Ann. ch. 55 at most was peripheral, its silence on municipal election spending illustrating Massachusetts' legislative judgment on the proper division of governmental powers between the state and its political subdivisions. The propriety of that judgment is a matter of state law and raises no substantial federal question. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 176 (1907).

C. The Appellants Cannot Invoke Federal Constitutional Claims Against The Commonwealth Of Massachusetts.

The Massachusetts Supreme Judicial Court held, as a matter of state law, that:

> A municipality has no authority to appropriate funds for the purpose of taking action to influence the result of a referendum proposal to be submitted to the people at a State election (J.S. 6a).

The appellants, a municipality and some of its elected officials, seek to compel Massachusetts to grant one of its political subdivisions, the City of Boston, the right to appropriate and spend public funds for that purpose.

This Court has long held that:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State . . . . The State, therefore, at its pleasure may modify or withdraw all such powers . . . . In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178-179 (1907).

Furthermore, this Court has consistently held that a municipality is powerless to invoke constitutional claims "in opposition to the will of its creator." *Williams* v. *Mayor & City Council of Baltimore,* 289 U.S. 36, 40 (1933); *City of Trenton* v. *New Jersey,* 262 U.S. 182, 192 (1923) (constitutional restraints do not apply against the State in favor of its own municipalities); *City of Newark* v. *New Jersey,* 262 U.S. 192, 196 (1923) (regulation of municipalities is a matter peculiarly within the domain of the State; city cannot invoke protection of fourteenth amendment against State); *City of Worcester* v. *Worcester Consolidated Street Ry.,* 196 U.S. 539, 549 (1905) (city is only a political subdivision of the State with powers which may be increased or repealed at the will of the legislature).

The appellants attempt to dismiss this time-honored constitutional doctrine in a footnote (J.S. 20-21 n.21). Yet none of the cases cited by the appellants diminish the vitality of *Hunter* v. *City of Pittsburgh,* 207 U.S. 161 (1907). None involve the assertion of alleged constitutional rights by a political subdivision against its creator, and all recognize, in one way or another, that cities are "subordinate arms of a state government" and ". . . derive their authority and power from their respective States." *E.g., National League of Cities* v. *Usery,* 426 U.S. 833, 855-6 n.20 (1976).

Since the City of Boston and its officials may not invoke a federal constitutional claim against the Commonwealth of Massachusetts, this case presents no substantial federal question. *City of Trenton* v. *New Jersey,* 262 U.S. 182 (1923); *City of Newark* v. *New Jersey,* 262 U.S. 192 (1923).

D. The Appellants' Reliance On The "Right To Hear" Cases Is Misplaced.

The appellants assert that:

> [E]ven if Appellants have no independent right to speak, the people of the City of Boston and the people of Massachusetts have a right to hear the views Appellants hold on referendum questions — and Appellants may properly assert that right before this Court. (J.S. 13 n.12).

The appellants rely on a recent line of cases beginning with *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). Those cases, all of which involve an audience demonstrably desirous of receiving the challenged communication, are inapposite. Lamont was a willing addressee clearly interested in receiving "communist political propaganda." *Id.* at 304. In *Procunier* v. *Martinez,* 416 U.S. 396 (1974), the rights protected were those of persons in:

> . . . direct personal correspondence [with] inmates and . . . hav[ing] a particular interest in communicating with them . . . . *Id.* at 408 (footnote omitted).

In *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972) the cited dictum indicates that

> The rights asserted here . . . are those of American academics who have invited Mandel to participate with them in colloquia, debates and discussions in the United States. *Id.* at 764.

In *Madison Joint School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), the speaker and hearers met face-to-face and their rights were "inextricably meshed." *Id.* at 175 n.7.

In the instant case, there is no such intimate, preexisting relationship between speaker and hearer. The neutral electorate has not demonstrated its eagerness to hear the City's message in any fashion. Absent such a demonstration, the appellants may not rely on the hearers' rights or even have standing to assert them. *Madison Joint School District* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167, 175 n.7 (1976). The "right to hear" cases have no application herein.

E. The Court Below Did Not Suppress Speech In Any Way.

The appellants contend that the court below imposed a "flat ban" on speech (J.S. 2); that it "silence[d] one voice in the political debate" (J.S. 2); that "municipal corporations and their elected officials . . . [were] silenced

by state laws" (J.S. 11); that the "voices . . . of Appellants [have] been stilled" (J.S. 14); that "the mayor['s] and certain other public official['s] freedom to speak is . . . uncertain" (J.S. 16); and that the "majority" has been silenced "in order to protect a supposed . . . minority." (J.S. 18 n.18). The appellants' rhetoric is as inaccurate as it is colorful.

The court below silenced no one. Its order was concerned solely with the expenditure of public funds:

> The order which was entered on July 19, 1978 . . . dealt with the expenditure of funds. Such an order is appropriate in an action brought under G.L. c. 40, §53, where a municipality is about to raise or expend money for purposes not authorized by law. That order enjoins the city from using any funds specifically appropriated to be used to influence the vote on the classification amendment (J.S. 22a) (citation omitted)
>
> . . . we decline to issue an injunction or to make any specific declaration concerning the lawful limits of [the] conduct [of municipal employees]. (J.S. 23a).

The Supreme Judicial Court was concerned with the propriety of a municipal expenditure under state statutes and the Massachusetts Constitution. No speech was suppressed and no federal constitutional issue is presented.

F. The Court Below Did Not Base Its Holding On The Federal Constitutional Rights Of Dissenting Taxpayers.

The appellants' claim that the "Supreme Judicial Court in fact upheld a federal right on the part of . . . dissenting taxpayers" (J.S. 32) is simply wrong. As noted above, pp. 2, 7-8, *supra,* the court below grounded its decision in state law. The Supreme Judicial Court vigorously rejected the appellants' claim that First Amendment rights were important to the resolution of this case:

> By its terms and in its traditional applications, the First Amendment has nothing to do with a State's determination to refrain from speech on a given topic or topics and to bar its various subdivisions from expending funds in contravention of that determination.
>
> . . . we suspect that the First Amendment has nothing to do with this intra-state question of the rights of a political subdivision to disregard the mandate of the supreme legislative authority of the State. (J.S. 14a-15a).

It is true that in a portion of its opinion, the court below assumed *arguendo* the existence of a municipal right of free speech (J.S. 15a-21a). However, the conclusion the court below reached was:

> Even if we were to assume that the appropriation of funds by a municipal corporation to engage in robust, partisan speech is expression that the First Amendment was meant to protect, there are demonstrated, compelling interests of the Commonwealth which justify the "restraint" which the Commonwealth has placed on the city. (J.S. 16a-17a).

Certainly, the court below did not find "demonstrated, compelling interests *of the Commonwealth*" in the First Amendment rights of dissenting taxpayers. The source of the "demonstrated, compelling interests" is:

> The Commonwealth['s] . . . substantial, compelling interest in assuring the fairness of elections and the appearance of fairness in the electoral process. It may protect that interest by excluding its political subdivisions from partisan involvement in election questions . . . (J.S. 17a).
>
> The Commonwealth's strong interest in free and fair elections is expressed in the Constitution of the Commonwealth. (J.S. 17a).

After discussion of two Articles of the Massachusetts Constitution and related state statutes, the Supreme Judicial Court concluded:

> The Legislature may decide, as it has, that fairness in the election process is best achieved by a direction that political subdivisions of the State maintain a "hands off" policy. (J.S. 18a).
>
> . . . . Fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose. (J.S. 19a).

The Supreme Judicial Court was moved by considerations of electoral fairness arising out of state law and not by First Amendment considerations. Similar considerations of electoral fairness have impelled many state courts to forbid the expenditure of public funds to influence elections:

> . . . every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not implicitly authorized . . . or on the broader ground that such expenditures are never appropriate. *Stanson* v. *Mott*, 17 Cal.3d 206, 217, 551 P.2d 1, 8-9 (1976) (citations omitted).
>
> The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public . . . can only demean the democratic process. As a state agency supported by public funds they cannot advocate their favored position on any issue or for any candidate, as such. So long as they are an arm of the state government they must maintain a position of neutrality and impartiality. *Stern* v. *Kramarsky*, 84 Misc. 2d 447, 452, 375 N.Y.S.2d 235, 239 (Sup. Ct. 1975).

Those considerations of fairness under state election laws do not raise any substantial federal question.[1]

III. Conclusion

The appellees submit that the appeal herein presents no substantial federal question and respectfully move this Honorable Court to dismiss the appeal.

Respectfully submitted,

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Dated: November 15, 1978

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[1] The Supreme Judicial Court's only brief mention of the rights of dissenting taxpayers and of *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) is at the very end of its analysis (J.S. 20a-21a). The discussion there was not critical to its analysis or its holding and gives rise to no substantial federal question.

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Brief in Opposition to Appellees' Motion to Dismiss.

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In the
Supreme Court of the United States.

October Term, 1978.

No. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEILL, CHRISTOPHER A. IANELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, and JOHN WEIS,
Appellants,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDWELL, and WILLIAM M. YATES,
Appellees.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Opposition to Appellees' Motion to Dismiss.

This brief is in opposition to Appellees' Motion to Dismiss in the above-captioned case.

1. Appellees conceded on October 21, 1978, in their Motion for Reconsideration before Mr. Justice Brennan (p. 4) that "plenary review is desirable and appropriate" in this case. They now urge that the appeal be dismissed for want of a substantial federal question — despite that concession, and despite this Court's action on November 6, 1978, in refusing to vacate Mr. Justice Brennan's stay of October 20, 1978. Even if such summary disposition were not peculiarly inappropriate under these circumstances, it would be substantively unwarranted.

In their most recent submission, Appellees seek to avoid the explicit holding of the Court below that Mass. Gen. Laws ch. 55 operates to "bar municipalities from engaging in the expenditure of funds to influence election results." J.S. 8a. To treat Chapter 55 as "peripheral," Motion to Dismiss 8, and to focus solely on the Home Rule Amendment, is simply to misstate what the Supreme Judicial Court held.[1] In any event, the judgment below obviously does not become more defensible when recast as upholding the Home Rule Amendment (in addition to Chapter 55) over Appellants' First and Fourteenth Amendment challenge. What the Court below *did* is unmistakable: Having broadly construed municipal home rule powers, J.S. at 6a-7a, the Court found in state statutory law a ban on certain municipal advocacy activities[2] — not those directed by municipalities to the legislature, J.S. 11a n.11, or those dealing with non-referendum issues, J.S. 9 n.7, but only those addressing the people on referendum questions.

[1] Although the Supreme Judicial Court observed that the Home Rule Amendment authorizes a municipality to exercise any power that the legislature could confer upon it so long as the exercise of such power is not inconsistent with state statute, only Chapter 55 was held to prohibit municipal advocacy. J.S. 7a-8a.

[2] As to Appellees' suggestion that only money and not speech is involved, Motion to Dismiss 11-12, *see* J.S. 14 n.13.

Thus, whatever the current vitality of such decisions as *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907), this case squarely involves the power of the state to engage in selective control over speech — directing not only who may speak but on what subjects and to what audiences.[3] The applicability of *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), to such selective control where municipal corporations are the speakers but private citizens are the listeners quite clearly presents a substantial federal question. *Cf. Madison Joint School Dist.* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 n.7 (1976); J.S. 21 n.21.

2. Although stressing in the Court below the unfairness of municipal advocacy to dissenting taxpayers, Plaintiffs' Brief at 15, Appellees seek in this Court to minimize the degree to which that concern underlay the holding below, denying "that the 'Supreme Judicial Court in fact upheld a federal right on the part of . . . dissenting taxpayers' (J.S. 32) . . .." Motion to Dismiss 12-13. On the contrary, after canvassing other interests that it deemed compelling, the Supreme Judicial Court treated *only* the interest in protecting "a dissenting minority of taxpayers," J.S. 20a, as justifying the ban in this case. J.S. 27-37. And in support of such an interest, the Court below relied exclusively on *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), and on *Wooley* v. *Maynard*, 430 U.S. 705 (1977). J.S. 20a-21a & nn.19-20. That the Supreme Judicial Court's reference to these two cases may have been "brief," Motion to

[3] Just as the theoretical power of a state to make city officials appointive rather than elective implies no authority to allocate votes unequally in a city election, *see Sailors* v. *Board of Education*, 387 U.S. 105, 108-111 (1967); *Avery* v. *Midland County*, 390 U.S. 474, 484-486 (1968); *Hadley* v. *Junior College Dist.*, 397 U.S. 50, 58-59 (1970), so a state's theoretical power to make its cities and towns mere administrative arms of the central government, with no voices of their own, implies no authority to subject municipal advocacy to discriminatory, content-based regulation.

Dismiss 15 n.1, cannot obscure the fact that its reliance upon them was decisive.[4] Thus, the second of the Questions Presented, J.S. 5, warrants plenary review, *whether or not* a selective state ban on municipal advocacy would be otherwise reviewable.

3. For the foregoing reasons, Appellants respectfully request that Appellees' Motion to Dismiss the appeal be denied.

LAURENCE H. TRIBE,
Counsel for Appellants.

November 16, 1978.

[4]Inasmuch as the Court below found in the record no showing that the challenged advocacy actually threatened electoral fairness, J.S. 19a n.18, that rationale neither did nor could suffice to support the injunction entered below. *See* J.S. 27-28 & n.24.

Supreme Court, U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

NO. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEIL, CHRISTOPHER A. IANNELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, AND JOHN WEIS,

APPELLANTS,

v.

RICHARD L. ANDERSON, GEORGE M. BURKE, DONALD G. COLONY, ROBERT L. HUGHES, JR., ANDREW A. HUNTER, ARNOLD LONDON, FRANK REMICK, EDWARD N. WADSWORTH, RICHARD WAIT, THOMAS R. B. WARDELL, AND WILLIAM M. YATES,

APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion for Leave to File and Brief of the Massachusetts Mayors' Association as Amicus Curiae in Support of Appellants' Jurisdictional Statement.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-649.

CITY OF BOSTON, KEVIN H. WHITE, PATRICK F. McDONOUGH, FREDERICK C. LANGONE, ALBERT L. O'NEIL, CHRISTOPHER A. IANNELLA, JAMES MICHAEL CONNOLLY, JAMES V. YOUNG, JAMES HYDE, AND JOHN WEIS,
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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Motion for Leave to File Amicus Curiae Brief in Support of Appellants' Jurisdictional Statement.

Pursuant to Rule 42, the Massachusetts Mayors' Association, Incorporated (the "Mayors' Association"), a voluntary, non-profit association of Massachusetts cities, moves for leave to

file an *Amicus Curiae* brief in support of Appellants' Jurisdictional Statement. The written consents of all parties to the filing of the *Amicus Curiae* brief have been obtained and have been filed with this Court.

The Mayors' Association had intended to submit an *Amicus Curiae* brief substantially prior to the consideration of the Jurisdictional Statement (J.S. 32 n.31), but decided to refrain from such a submittal after the stay of the Supreme Judicial Court's decision was granted in this Court on October 20, 1978, by Mr. Justice Brennan as Circuit Justice. The determination not to submit a brief was reaffirmed after this Court's November 6, 1978, denial of Appellees' motion to vacate the stay. However, the Court's intervening silence with regard to noting probable jurisdiction of this appeal has left the Mayors' Association apprehensive that probable jurisdiction might not be noted. The Mayors' Association believes that this would be a mistake, since municipalities, the Mayors' Association and all other publicly funded entities in Massachusetts continue to be subject to a prior restraint on their right to free expression by the Supreme Judicial Court's decision that public funds may not be appropriated and expended for referendum advocacy purposes. Therefore, the Mayors' Association believes that this Court should be made aware of the Mayors' Association's continuing interest and concern on this matter, and it respectfully moves that it be granted leave to file an *Amicus Curiae* brief at this time.

Respectfully submitted,

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Dated: December 22, 1978.

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OCTOBER TERM, 1978.

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APPELLEES.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Massachusetts Mayors' Association as Amicus Curiae in Support of Appellants' Jurisdictional Statement.

Pursuant to Rule 42, the Massachusetts Mayors' Association moves to file this brief as *Amicus Curiae* in support of the Appellants' Jurisdictional Statement. The written consents of all parties to file this brief have been obtained and have been filed with this Court.

The Massachusetts Mayors' Association supports the Jurisdictional Statement of the Appellants and adopts their recital of the proceedings below, this Court's jurisdiction, the questions presented and the statement of the case.

I. Statement of Continuing Interest.

A. Interest of the Mayors' Association.

The Massachusetts Mayors' Association, Incorporated (the "Mayors' Association"), was incorporated in 1945 as a voluntary, non-profit association of Massachusetts cities for the purposes, *inter alia*, of studying legislation and advancing and supporting sound state and national government. The Mayors' Association is non-sectarian and non-political in that it never promotes or supports the candidacy of any particular person for public office.

In Massachusetts there are thirty-nine cities and four towns with city councils; those cities and towns are eligible to be members of the Mayors' Association. At present, there are thirty-five members. Dues and assessments to the Mayors' Association are paid by the member municipalities out of public funds appropriated for that purpose from general tax revenues.

The Mayors' Association has an immediate, continuing and compelling interest in this Court's noting probable jurisdiction of this appeal, since the Supreme Judicial Court's construction of Mass. Gen. Laws ch. 55 ("Chapter 55")[1] has cast grave

[1] "[C]omprehensive legislation, enacted after the adoption of the Home Rule Amendment, regulating election financing manifests an intention to bar municipalities from engaging in the expenditure of funds to influence election results. G.L. c. 55, as appearing in St. 1975, c. 151, § 1." (J.S. 8a.)

doubt upon the Mayors' Association's ability as a publicly funded entity, and the ability of its members as elected public officials, to continue engaging in publicly funded advocacy on statewide referenda questions when such advocacy is determined by the Mayors' Association or by its members to be in the best interests of the public they represent.[2]

Because of its broad language and sweeping scope, the Supreme Judicial Court's ban on statewide advocacy by the expenditure of public funds by its "political subdivisions" (J.S. 17a) violates the First and Fourteenth Amendments to the United States Constitution and abridges expression of the Mayors' Association and of other publicly funded entities (such as the Massachusetts League of Cities and Towns, the Massachusetts Selectmen's Association and the Massachusetts Municipal Management Association)[3] that the First Amendment was meant to protect.[4]

[2] This case arose out of the City of Boston's and Mayors' Association's desires to advocate passage of a proposed amendment to the Massachusetts Constitution which would authorize the Massachusetts General Court to "classify real property according to its use in no more than four classes and to assess, rate and tax such property differently in the classes so established but proportionately in the same class, and except that reasonable exemptions may be granted." This proposed amendment, known as the "Classification Amendment," would change the state constitutional requirement that all real property be taxed at 100 per cent of fair cash value. On November 7, 1978, the Classification Amendment was overwhelmingly adopted by the Massachusetts voters.

[3] Some of the other entities which are funded in whole or in part by "public funds" (J.S. 18a), and which are therefore affected by Chapter 55's ban include: Association of Town Finance Committees, Local Officials Human Service Council, Inc., Massachusetts Association of Conservation Commissions, Massachusetts Association of School Committees, Inc., Massachusetts Federation of Planning Boards, Inc., Metropolitan Area Planning Council.

[4] The Mayors' Association has a vital interest in upholding its members' First Amendment rights to expend public funds to advocate and inform their

The manner in which the Chapter 55 ban restricts the activities of the Mayors' Association is illustrative of the restraints which it presently imposes upon all publicly funded entities. In furtherance of its goals, the Mayors' Association has, since its inception, not only proposed legislation to the Massachusetts General Court but also engaged in public lobbying efforts with regard to its proposed legislation and with regard to other pending matters when the Mayors' Association believes that doing so is in the best interests of its members and their constituents and advances sound government. Legislative areas in which the Mayors' Association has been involved over the years have included, among others, fiscal, structural and personnel matters.[5]

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inhabitants on statewide referenda questions when such questions are related to the form, function and interests of the municipality.

The Mayors' Association also has a vital interest in upholding the First Amendment rights of Massachusetts citizens to be advised on public issues and to obtain information and arguments regarding referenda questions pertinent to the form, function and interests of their government regardless of the source of such information, in the absence of any findings that free and fair elections would be abused by such advocacy or that publicly funded advocacy would be monopolistic, domineering or calculated to perpetuate any official in office.

[5]The 1978 Mayors' Association's legislative program is representative of its previous annual programs. Fiscal matters included: 1. Creation of a state/local revenue sharing plan, 2. Prohibition of state mandated costs of local government, 3. State assumption of post-secondary, vocational educational costs and 4. Exemption of municipalities from diesel fuels tax.

Structural matters included: 1. Creation of a local government advisory committee, 2. Fiscal home rule for counties, 3. Increasing management capacity of local government and 4. Municipal control over consortiums or regional groupings.

Personnel matters included: 1. Management rights, 2. Exclusion of supervisory personnel from collective bargaining, 3. Study of pension benefit reform and 4. Study of civil service decentralization.

Other matters included: 1. Authorization for a municipality to provide sewer services to subdivisions, 2. Opposition to preemption of local liquor license cancellations and 3. Permanent state assumption of 50 per cent of Massachusetts Bay Transportation Authority costs.

The Mayors' Association currently maintains a joint legislative office with its kindred associations, the Massachusetts Selectmen's Association, the Massachusetts League of Cities and Towns and the Association of Town Finance Committees, in order to administer its legislative program.[6]

The Mayors' Association's activities with regard to this legislative program include informing the voters about pending legislation and encouraging the voters to become involved in the legislative process. The Mayors' Association also solicits voter support for its legislative program and for its lobbying activities.

In addition, the Mayors' Association has, in the past, taken positions on and taken action designed to influence the results of referenda questions proposed to be submitted to the people at statewide elections. In 1976, for example, the Mayors' Association opposed a referendum question that would have authorized a state take-over of private electric power production, in light of the projected loss of municipal taxes paid by privately owned electric companies and the resulting diminution of local tax revenues.

With regard to the Classification Amendment, the Mayors' Association was involved for several years in reviewing, studying and commenting upon it;[7] and ultimately the Mayors' Association concluded that sound government for Massachusetts would be advanced and supported by the adoption of the Classification Amendment. The Mayors' Association therefore embarked upon a campaign to inform the voters of the effects

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[6]The Mayors' Association also maintains a joint administration and finance office, a joint publication policy and shares office space and telephone services with the Massachusetts Selectmen's Association, the Massachusetts League of Cities and Towns, the Massachusetts Municipal Management Association and the Association of Town Finance Committees.

[7]Classification is not a new idea. A Classification Amendment was a state referendum question in 1970; it was defeated at that time.

of classification and 100 per cent valuation and to advocate adoption of the Classification Amendment. A special assessment was made upon all members of the Mayors' Association in order to pay for this campaign. However, the Mayors' Association was forced to abandon this advocacy campaign by the Supreme Judicial Court's decision that "We thus construe G.L. c. 55 as preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a State election." (J.S. 9a.) The rationale of the ban on municipal appropriations and expenditures plainly extended to all publicly funded bodies and was clearly calculated to encompass the Mayors' Association as such; indeed, the Supreme Judicial Court expressly raised the spectre of a taxpayers' suit against the Mayors' Association with regard to a special assessment made specifically for referendum advocacy purposes.[8]

As a result, for weeks prior to the vote on this important referendum question the Mayors' Association was forced to stand by and refrain from advocacy solely because it is publicly funded, while non-publicly funded corporations and entities were free to disseminate any sort of information they wished — and did so, at great expense. It was only by reason of the stay granted in this Court on October 20, 1978, by Mr. Justice Brennan as Circuit Justice that the Mayors' Association was

[8] "No claim has been made concerning the recovery of funds already expended. . . . In any event, . . . the Massachusetts Mayors' Association, which received $112,550 from the city . . . [for advocacy on the Classification Amendment] is [not] a party to this proceeding. We decline to express any view concerning whatever obligation there may be to restore, or to seek to recover, these amounts which were paid not only after this action was commenced but also after the defendants had knowledge of the action." (J.S. 22a-23a.)

able to engage in referendum advocacy for a brief period prior to the November 7, 1978, vote on the Classification Amendment.

The Mayors' Association is of course delighted with the favorable outcome of the vote on the Classification Amendment and believes that its advocacy efforts might in some small measure have contributed to that outcome. But the issues presented by this appeal are of continuing importance to the Mayors' Association, and to its members, since the Supreme Judicial Court's decision continues to operate as a prior restraint upon the Mayors' Association's and its members' right of free speech to engage in advocacy on future referenda questions of vital concern to the cities and towns they represent.

The Mayors' Association anticipates a substantial number of referenda questions likely to arise in the near future on which it may wish to take a position in the interest of advancing sound local government. Such referenda questions may include: the imposition of tax limits upon state and/or local government, the redistricting of county boundaries, the adoption of a state graduated income tax, the imposition by municipalities of taxes other than real estate taxes, the expansion or contraction of the Massachusetts Home Rule Amendment, substantial changes in the public employment laws, substantial changes in pension benefits for public employees and determinations of how regional transportation systems should be designed and developed. These questions and others like them go to the heart of the form, financing and functioning of state and local governments; they are vitally related to how state and local governments will respond to the needs and desires of their citizens; and they can be expected to arise with growing frequency. Yet, as a publicly funded entity, the Mayors' Association cannot safely advocate positions on any of them in light of the Supreme Judicial Court's decision.

B. Mootness.

Although the vote on the Classification Amendment has taken place, this appeal is not moot, (as Appellees have themselves conceded, see Motion for Reconsideration before Mr. Justice Brennan, p. 4), for it clearly falls within the class of controversies "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). Indeed, this question is identical to that raised in *First Nat'l Bank* v. *Bellotti*, ____ U.S. ____, 98 S. Ct. 1407 (1978), where the 1976 challenge to that portion of Chapter 55 which prohibited business corporations from engaging in referendum advocacy on certain questions did not reach this Court until after the 1976 vote had taken place. In *Bellotti* the Court concluded that the issue was not moot, finding present the two elements identified in *Weinstein* v. *Bradford*, 423 U.S. 147 (1975), which preclude a finding of mootness even in the absence of a class action: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *First Nat'l Bank* v. *Bellotti*, *supra*, 98 S. Ct. at 1414 (quoting from *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975)).

The only difference between *Bellotti* and this case is that the Classification Amendment has been adopted. But Appellants and the Mayors' Association should not be penalized for their successful advocacy pursuant to Mr. Justice Brennan's stay. Nor does the law require or permit any such penalty, for both of the elements identified in *Weinstein* v. *Bradford* exist here, as well.

Under no reasonably foreseeable circumstances could the Appellants, the Mayors' Association or any other publicly funded entity obtain plenary review by this Court of the issues

presented here regarding referendum advocacy by a publicly funded entity in advance of a future statewide referendum. The history both of this case and of *Bellotti* demonstrates that such judicial review has been impossible in the past because of the short period of time involved, "and there is every reason to believe that any future suit would take at least as long." *Bellotti*, *supra*, 98 S. Ct. at 1415.

Further, there is every reason to believe that the Appellant, City of Boston, would be subjected to the same action again if it sought to appropriate and expend funds for referendum advocacy. This suit arose pursuant to a Massachusetts statute, Mass. Gen. Laws ch. 40, § 53, which authorizes any ten taxable inhabitants of a municipality to challenge allegedly illegal municipal appropriations and expenditures. If this appeal were to be dismissed, and the stay thereby lifted, all would know that one such successful challenge had been made to the City of Boston's advocacy activities; the fact that this challenge was thwarted by a stay order would hardly deter future challenges by the same or other taxable inhabitants if Boston or any other public body attempted other publicly funded referendum advocacy.[9]

By the very nature of the case, then, this matter falls squarely within this Court's decisions relating to other election mat-

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[9]While this is not a class action, the issues raised in this appeal are relevant to all municipalities, to the Mayors' Association, and to all other publicly funded entities in Massachusetts and elsewhere. Although elections might repeatedly seem to moot this and similar challenges, the basic issue of advocacy with public funds will not go away. See, *e.g.*, *Mountain States Legal Foundation* v. *Denver School District No. 1*, 47 U.S.L.W. 2338 (D. Col., November 28, 1978), where on October 28, 1978, the United States District Court for the District of Colorado granted, on federal constitutional grounds, a request for a preliminary injunction to prevent the implementation of the Denver School Board's resolution authorizing the use of School District facilities and funds to advocate the defeat of a proposed amendment to the Colorado Constitution. That case also could not have reached this Court prior to the November election.

ters, all of which support the proposition that this appeal is not moot. In *Dunn* v. *Blumstein*, 405 U.S. 330, 333 n. 2 (1972), a class action suit challenging a Tennessee law which imposed a residency requirement on voter registration, the Court stated: "Although appellee now can vote, the problem to voters posed by the Tennessee residence requirement is '"capable of repetition, yet evading review."'" In *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8 (1974), this Court upheld the constitutionality of California statutes relating to procedures for persons who seek ballot positions as independent candidates even though the election had come and gone. The Court stated:

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is 'capable of repetition, yet evading review.' [Cites omitted.] The 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks. *The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.*" (Emphasis supplied.)

See also, *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), and *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 122 (1974).

The Appellants, the Mayors' Association and all Massachusetts municipalities and public bodies need a construction and a delineation of the constitutional limits of Chapter 55 vis-à-vis their right to appropriate and expend public funds for advocacy on referenda questions. Faced by the threat of repeated ten taxpayer suits, on similar referenda disputes in the future, no Massachusetts municipality or publicly funded entity can engage in advocacy without fear of an injunction.

II. The Questions Presented are Substantial.

The Questions Presented in the Appellants' Jurisdictional Statement at 5 set forth the matters of greatest concern to the Mayors' Association, as those matters relate to the rights of publicly funded entities. We believe that each of the Questions warrants plenary review and that Appellants' Brief in Opposition to Appellees' Motion to Dismiss sufficiently disposes of the claim that, despite the opinion below and the stay of October 20, 1978, no federal constitutional question is posed. Indeed, the strongest argument for doubting the presence of a substantial federal question — that based on *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907), and advanced by Justices Stevens, Stewart and Rehnquist in their dissent from this Court's November 6, 1978, denial of the motion to vacate Mr. Justice Brennan's stay — seems to the Mayors' Association to have been answered not only by Appellants' November 16, 1978, Brief in Opposition to Appellees' Motion to Dismiss (at 3 & n. 3) but also by this Court's recent reminder that *Hunter* v. *Pittsburgh's* "broad statements as to state control over municipal corporations . . . have undoubtedly been qualified by the holdings of later [election] cases. . . ." *Holt Civic Club* v. *City of Tuscaloosa*, 47 U.S.L.W. 4008, 4011-12 (U.S. Sup. Ct., November 28, 1978) (dictum).

III. Conclusion.

The Massachusetts Mayors' Association submits that this appeal brings before the Court substantial federal questions which are not moot and which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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Dated: December 22, 1978.